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VOL. VII. TORONTO, DECEMBER, 1861. No. 12.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

PRINTED AND PUBLISHED BY W. C CHEWETT & CO., 17 & 19 KING STREET EAST, TORONTO.

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CONTENTS.

REMITTANCES.

Judge L., Niagara, $30; W. M. W., Simcoe, $14; G. S., St. Ann's, $5.

CROWN LANDS DEPARTMENT,
Quebec, 2nd November, 1861.

NOTICE is hereby given, that persons who may have purchased (Crown or School) lands in the County of Bruce; in the Townships of Ashfield, Grey, Howick, Morris, Turnberry and Wawanosh, in the County of Huron; in the Townships of Elma and Wallace, in the County of Perth; in the Townships of Artemesia, Bentinck, Derby, Egermont, Glenelg, Holland, Melancthon (New Survey), Normanby, Osprey, Sullivan and Sydenham, in the County of Grey; in the Townships of Arthur and Minto, in the County of Wellington, U. C.; and have not complied with the condition of the sales, as regards settlement on the land, are required to complete their purchases forthwith, at the rate of 10s ($2) an acre, with interest thereon from the dates of the respective sales, and with the addition of 1s. 3d. (25 cents) an acre, so that Patents may be issued, when no adverse claims exist.

In default of payment before the FIRST of FEBRUARY next, the Lands will be resumed and offered at Public Sale.

Persons having made the necessary improvements are required to furnish the Agents of the Department with evidence thereof.

P. M. VANKOUGHNET,
10—6 in. *Commissioner.*

DEPARTMENT OF CROWN LANDS,
Quebec, 8th November, 1861.

NOTICE is hereby given that the undermentioned Crown Land Agencies in Upper Canada, will be closed on the FIRST of JANUARY next, after which date, parties having payments to make, or any business to transact connected with the Public Lands therein, must communicate direct with the Department.

AGENCY.	AGENTS.
Stormont, Dundas and Glengary.....	S. HART,
Prescott and Russell.....	N. STEWART,
Carleton.....	J. DURIE,
Lanark	G. KERR,
Leeds and Grenville.....	W. J. SCOTT,
Prince Edward.....	N. BALLARD,
Hastings, (South part of)...	F. MCANNANY,
Northumberland and Durham.....	W. WALLIS,
Peterborough, (South part of).....	W. CRAWFORD,
Wentworth.....	T. A. AMBRIDGE,
Lincoln, Haldimand and Welland.....	H. SMITH,
Norfolk.....	D. CAMPBELL,
Oxford and Brant.....	J. CARROLL,
Kent	R. MONCK,
Lambton	A. SCOTT,
Waterloo	H. S. HUBER.

Parties desiring to claim through any of the above Local Agents should do so at once

ANDREW RUSSELL,
10—6 in. *Assistant Commissioner.*

DEPARTMENT OF CROWN LANDS,
Quebec 18th October, 1861.

NOTICE is hereby given that parties having payments to make, or any business to transact connected with the Public Lands, in the counties of York, Ontario, Peel, Halton, Middlesex, Elgin and Essex, must communicate direct with the Department, the agencies for those Counties having been closed.

ANDREW RUSSELL,
10—6 in. Assist. Com.

DEPARTMENT OF CROWN LANDS,
Quebec 31st October, 1861.

NOTICE is hereby given that those lots in the township of Proton, in the County of Grey, U. C., remaining unoccupied and unimproved, the purchase of which shall not be completed within three months from the late sale thereof, will be resumed and again offered at public sale.

Occupants of lots must furnish evidence of their improvements to the Agent of the Department at Durham.

P. M. VANKOUGHNET,
10—6 in. Commissioner.

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. WM. B. LINDSAY, Clk. Assembly.

THE UPPER CANADA LAW JOURNAL,

MUNICIPAL AND LOCAL COURTS' GAZETTE,

Conducted by W. R. ARDAGH, Barrister at Law, and ROBT. A. HARRISON, B.C.L., Barrister-at-Law,

IS published monthly in the City of Toronto, at $4 per annum if paid before 1st March in each year, $5 if paid after that period; or five copies to *one address* for $16 per annum, in advance.

It claims the support of Judges, Lawyers, Officers of Courts, Municipal Officers, Coroners, Magistrates, and all concerned in the administration of the Law, on the following grounds:

1st. It is the only Legal Periodical published in Upper Canada.

2nd. Each number contains Reports of cases—many of which are not to be found in any other publication.

3rd. Chamber Decisions are reported expressly for the Journal.

4th. Each number contains original articles on subjects of professional interest.

5th. Each number contains articles in plain language for the guidance and information of Division Courts, Clerks, Bailiffs and Suitors, and Reports of cases of interest to all whose support is claimed.

6th. Each number contains a Repertory of English decided cases on Points of Practice.

7th. It is the only recognized organ of intercommunication between Lawyers, Officers of Courts, and others concerned in the administration of law.

8th. It is the only recognized medium of advertising on subjects of legal interest.

9th. It circulates largely in *every* City, Town, Village and Township in Upper Canada.

10th. It exchanges with more than fifty contemporary periodicals published in England, the United States, Upper and Lower Canada.

11th. It has now reached the seventh year of its existence, and is steadily increasing the sphere of its usefulness.

12th. It has advocated, and will continue to advocate, sound and practical improvements in the law and its administration.

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W. C. CHEWETT & CO., *Publishers*, Toronto.

OPINIONS OF THE PRESS.

The Upper Canada Law Journal.—This well conducted publication we are glad to learn has proved eminently successful. Its contents must prove of great value to the profession in Canada and will prove interesting in the United States.—*American Railway Review*, September 20th, 1860.

The Upper Canada Law Journal.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession but also to Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1860.

Upper Canada Law Journal.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 25th.*

The Upper Canada Law Journal, for May. W. C. Chewett & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well written original articles on Municipal Law Reform, responsibilities and duties of School Trustees and Teachers, and a continuation of an Historical Sketch of the Constitution Laws and Legal Tribunals of Canada.—*Thorold Gazette, May 10th*, 1859.

Upper Canada Law Journal.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in a hundred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 16th* 1859.

The Upper Canada Law Journal. W. C. Chewett & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first No. of the fifth volume of this highly useful Journal, published by W. C. Chewett & Co., of Toronto and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the profession's at home to all others.

There is no magistrate, municipal officer, or private gentleman, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages a history of the constitution and laws of Canada from the assumption of British authority. Subscription $4 00 a year, and for the amount of valuable and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 1st 1859.

The Law Journal of Upper Canada for January. By Messrs. Ardagh and Harrison. W. C. Chewett & Co., Toronto. $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. W. C. Chewett & Co., King Street East, Toronto.

This is the first number of the Fifth Volume: and the publishers announce that the terms on which the paper has been furnished to subscribers will remain unchanged—viz., $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorold Gazette, January* 27, 1859.

The Upper Canada Law Journal and Local Courts' Gazette, is the name of an excellent monthly publication, from the establishment of W. C. Chewett & Co., Toronto.—It is conducted by W. D. Ardagh, and R. A. Harrison, B.C.L., Barrister-at-Law.—Price $4 per annum.—*Oshawa Vindicator*, October 13th, 1858.

Law Journal, for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable loan to the legal profession. We are not aware of the extent of its circulation in Brantford, it *should be taken*, however by every member of the Bar in town as well every Magistrate and Municipal Officer. Nor would politicians find it unprofitable, to pursue its highly instructive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 10th., 1858.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

Upper Canada Law Journal. W. C. Chewett & Co., Toronto, Jan.—We have so frequently spoken in the highest terms of the merits of the above periodical that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

U. C. Law Journal, August, 1858. Toronto, W. C. Chewett & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's 'Common Law Procedure Acts' is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is almost as useful to the English as to the Canadian lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurists*) have seen of these important acts of parliament.—*Odessey Star, August* 11th, 1858.

DIARY FOR DECEMBER.

1. SUNDAY ..... *Advent Sunday.*
2. Tuesday ..... Last day for notice of Trial County Court.
8. SUNDAY ..... *2nd Sunday in Advent*
10. Tuesday ..... Q. Sessions and County Court Sittings in each County.
12. Thursday ..... Sittings of Court of Error and Appeal begins. Last day for service of Writ for York and Peel Assizes.
14. Saturday ..... Last day for collection of money for School Teachers' Salaries. Collectors to return Assessment Roll to Treasurer or Chamberlain.
15. SUNDAY ..... *3rd Sunday in Advent*
22. SUNDAY ..... *4th Sunday in Advent.*
23. Monday ..... Nomination of Mayors. Last day to declare for York & Peel Assizes.
25. Wednesday ..... CHRISTMAS DAY.
29. SUNDAY ..... *1st Sunday after Christmas.*
31. Tuesday ..... End of Municipal year. Last day on which remaining half of Grammar School Fund is payable. Last day for notice of Trial for York and Peel Assizes.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

DECEMBER, 1861.

TO SUBSCRIBERS.

Subscribers are reminded that the present No. completes Volume Seven of the Upper Canada Law Journal. Those, indebted to the Journal are requested to make an immediate settlement of our demands against them. All such, by looking to the covers of their paper will ascertain the amount demanded. Remittances to be addressed to our publishers, Messrs. W. C. CHEWETT & Co., King St. East, Toronto.

COUNSEL FEES.

The profession of an advocate is in every civilized community esteemed one of distinction, as it is of influence.

In some respects akin to the "orator" of the Romans, it partakes of many of its characteristics.

One feature in common is, that the advocate of modern no more than the orator of ancient times, is allowed to sue for his services.

Sir John Davis, in the sixteenth century, wrote as follows: "The fees or rewards which they (barristers) receive are not of the nature of wages or pay, or that which we call salary or hire, which are indeed duties certain and grow due by contract for labour or service; but that which is given to a learned counsellor is called *honorarium*, and not *merces*, being indeed a gift which giveth honor as well to the taker as to the giver; neither is it certain or contracted for; no price or rate can be set upon counsel, which is invaluable and inestimable; so it is more or less according to circumstances—namely, the ability of the citizen, the worthiness of the counsellor, the weightiness of the cause, and the custom of the country. Briefly, it is a gift of such a nature, and given and taken upon such terms, as albeit the able client may not neglect to give it without note of ingratitude (for it is but a gratuity or token of thankfulness), yet the worthy counsellor may not demand it without doing wrong to his reputation, according to that moral rule, *Multa honeste accipi possunt, quæ tamen honeste peti non possunt.*" (Preface Davis' Reports.)

Quaint as this language may sound, and absurd as it may appear in this utilitarian age, it is law, almost as inflexible to-day as when first written.

On 10th June, 1858, Sir R. T. Kindersley, upon reading the petition of a barrister, for payment of his fees by a solicitor, and upon the argument being addressed to him that a barrister has a right in law to recover fees paid to a solicitor for him, said, "I hope the time will never come when such a rule is established. I will never make a precedent. If you bring me precedents and establish your case, I must make the order; but I will never willingly derogate from the high position in which a barrister stands, and by which he is distinguished from an ordinary tradesman." (*In re May*, 4 Jur. N. S. 1169.)

Barristers however, like other men, must live, and in modern times at least it has been found imprudent for them to trust to the gratitude of clients for subsistence. In what way, therefore, is the difficulty overcome? The same law which says they "shall not sue for their fees," says they shall in all cases "receive them in advance," and, worse still, "keep them though no service is performed for them."

On an application to compel an attorney in a cause to pay counsel fees collected by him, Erle, C. J., said, "I do not mean to sanction in any degree the notion of such applications. It may be that an attorney is wrong in delivering a brief with fees marked on it without their being paid; but then counsel are equally wrong who accept it on these terms, and we cannot be called on to entertain any proposition for us to interfere in such a case" (*In re Angell* 6 Jur. N. S. 1373.)

So where a person had given a brief with a fee to counsel on an expected trial, and the counsel neglected to attend, it was held that the fee could not be recovered back, because the fee was a present to the barrister by the counsel,

and not a payment or hire for labor (*Turner* v. *Phillips*, Peake, 122.)

Such is the rule and such are its consequences. Designed to elevate the members of the profession, it tempts men to dishonesty. It enables the client to cheat the barrister, and the barrister to cheat the client. That which is in fact a reward for services performed, or to be performed, is called a gratuity, and the idle form is retained while the substance is entirely changed.

The orator of ancient times sought his reward in the applause of multitudes, the gratitude of his countrymen, elevation to the highest offices in the State. His aim was high, and it suited his purposes to appear to despise gain. But the same rule, applied to the advocates of modern times, is little less than ridiculous.

Few men are born to affluence. Most men have to earn their livelihood by labor, mental or bodily. The laborer in either case is worthy of his hire. The hire is the natural fruit of his labor. Without it he cannot subsist. When he earns it he should not be ashamed to receive it, and the law should not be backward in seeing that he gets it.

We do not like to see a grasping covetous advocate. His profession is a liberal one, and we like to see his conduct square with the attributes of his profession. But at the same time we must condemn that false modesty which compels men to call that one thing which is in substance and in fact an entirely different thing—that a gratuity which is a reward for services performed or intended.

The following language of Bayley, J., is more in accordance with our views. "The suggestion is that by law no man is liable to pay for counsel at all. That seems to me to arise entirely from a mistake in point of law. It is never expected, it never has been the practice, and in many instances it would be wrong that counsel should be gratuitously giving up their time and their talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability and certainly of great integrity and with every qualification which is necessary to adorn the bar, to exert their talents. It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health, which a long attendance at the bar naturally produces; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence; and I know of nothing more likely to destroy that integrity and independence than to deprive them of the honorable reward of their labors." (*Morris* v. *Hunt*, 1 Chit. R. 544.)

The rule is day by day becoming less stringent. In Ireland it has been held, that although a barrister cannot sue on an implied contract for business performed, yet he may make an express contract for his fees and sue upon that contract, (*Hobart* v. *Butler*, 9 Ir. Com. L. R., 157,) and even in England barristers have been allowed as creditors to prove upon the estates of bankrupt solicitors for the amount of unpaid fees (*In re Hall*, 2 Jur. N. S., 1076. *Teed* v. *Beere*, 5 Jur. N. S., 381).

In the United States it is said that the rule was in Pennsylvania asserted for the last time in *Morney* v. *Lloyd*, 5 S. & R., 412. Chief Justice Gibson, of Pennsylvania, in speaking of the *honorarium* said, "Its principle had its origin in the Roman law, when the practice of oratory was so elevated as to be fancifully thought to be incapable of stooping to mercenary consideration without debasement. And the dignity of the robe, instead of any principle of policy, furnishes all the argument that can be brought to support it at the present day, for it is hard to imagine a principle of policy that would forbid compensation for services in a profession which is now as purely a calling as any mechanical art. The English courts adopted it practically and professedly on the foundation of dignity; they studiously restricted it to advocates. (*Foster* v. *Sacks*, 4 Watts, 33; see also *Adams* v. *Stevens*, 26 Wend. 455; *Stevens* v. *Morges*, 1 Hare, 127.)

In Upper Canada the same person is often both barrister and attorney. In England, from the earliest time, the attorney was allowed to sue for his fees. In Upper Canada therefore, neither is the necessity for the rule so great nor the rule so easily carried out as in England. By the old King's Bench Act it was enacted that the Court should "by rules or order, to be from time to time made, ascertain, determine, declare, and adjudge, all and singular, the fees which shall and may be taken or be allowed to be taken by any clerk of the Crown *counsel*, attorney, sheriff, officer, or other person, for or in respect of any business to be done in the Court of King's Bench, as well in civil causes as in criminal proceedings." The court accordingly framed a tariff of fees payable to counsel, which since has been from time to time amended and enlarged. As it now stands it will be found in Harrison's C. L. P. Acts, 712. It is a principle that where an Act of Parliament or Rule of Court casts upon a party an obligation to pay a specific sum of money to a particular person, the law enables that person to maintain an action for it. Accordingly it has been held that counsel claiming a fee under the statute or rule of court, and such as mentioned in the tariff, may maintain an action for it. Except in the case of fees taxable by the tariff, the principle of the English law which denies to counsel the right to sue for professional services, has been held to apply to Upper Canada (*Baldwin et al.* v. *Montgomery*, 1 U. C. Q. B., 283; see also *Smith et al.* v. *Graham*, 2 U. C. Q. B., 268)

NE SUTOR ULTRA CREPIDAM.

Often in courts of justice are Judges and Lawyers puzzled in attempts to decipher the meaning of some "document" composed of solemn nonsense.

Once we saw a memorandum of agreement prepared by an amateur conveyancer, in which the vendor agreed to sell a parcel of land to the vendee "without impeachment of waste," upon payment of a specified sum of money and interest.

On another occasion, we saw a deed of a lot of land from a man to a widow, to hold to her heirs and assigns for ever, "by the courtesy of England."

Instances such as these are of daily occurrence in Upper Canada. Now what is the source of them? It is that a most important branch of professional practice is open to all the world, including the man who sells you your groceries, the man who makes your boots, the man who sells you quack medicines to kill or cure your horse or dog and afterwards is ready to buy the hide of your horse or dog at the best price.

These remarks have been suggested by an advertisement cut from a local paper and sent us, of which advertisement the following is a copy:—

A —— B ——

COMMISSIONER, Q. B., CONVEYANCER, &c. Also, Dealer in Groceries & Provisions, Boots & Shoes, Crockery & Dry Goods, Room Paper & School Books, Patent Medicines, Blank Deeds and Memorials, &c., Cheaper than ever.
Cash paid for Hides, &c.

We respect an honest man of whatever calling. We despise no man because of his calling. Each is to be respected in his station. The grocer, the shoemaker, and the tanner, is each a useful member of society; but in order to be as useful as possible without danger to life or property, each should keep to his calling until fitted for a different one.

The villager, however parsimonious, would be more likely in case of sickness to entrust his malady to a known medical man than to a horse doctor or the village shoemaker. Why then should he, when about to acquire his "little all," entrust the transfer to a man whose only fitness is his effrontery or ability to write better orthography than his neighbours, when a skilled conveyancer may be had in the same locality?

The system is one of folly, often pregnant of penny wise and pound foolish consequences. It may be that the village shopkeeper, who knows more of a pound of Souchong tea than an estate in fee simple, will draw a deed for less money than the lawyer, who has spent years in acquiring a knowledge of estates, their nature, extent and mode of transfer. Time spent by a lawyer in acquiring a knowledge of his profession is capital. Money expended in the purchase of books is capital. When therefore he (the lawyer) is needed to make use of his skill so acquired, he must of necessity seek a greater recompense for his services than the man who did not spend a day in the study of the law, or buy a book with a view to its practice.

Many men, influenced by the paltry consideration of thus saving a dollar, lose thousands. We have known men incur the costs of heavy chancery suits in order to cure the blunders of ignorance or incapacity—too dear at any price. We have known other men lose properties, made valuable by years of toil, because of entrusting to incompetent men the responsible duty of transferring estates. Such men learnt wisdom by experience, but at such a price as to reduce them perhaps from a state of comparative affluence to absolute want. Others should be warned by their example.

THE LAW SOCIETY OF UPPER CANADA.

The institution of Scholarships has proved a decided success. The examinations during last term were of a very high character. Much interest was felt in them, and the successful candidates were warmly congratulated by their fellow students. The following is the result:—

FIRST YEAR.

John McKindsey	291	
L. C. Moore	282	
Codrington Reid	278	*æquales.*
George Kilpatrick	278	*æquales.*
Samuel Hoskins	253	

SECOND YEAR.

George Holmstead	267	
Richard Walkem	256	*æquales.*
Frederick Fenton	256	*æquales.*

THIRD YEAR.

Donald McLennan	298
George Rae	271
J. D. Edgar	240

The maximum number of marks that could be obtained by any candidate, either for the 1st, 2nd or 3rd year, was 320. The names of candidates whose marks were under 240 are not made known.

FOURTH YEAR.

Thomas Ferguson	360

The maximum number of marks that could be obtained by any candidate for this year was 480. The names of candidates whose marks are under 360 are not made known.

Much of the success of the Law Society is due to the well known energy of its Treasurer. The reforms which have been originated since his election to office, and are now being carried out under his guidance, are in every respect calculated to elevate our profession, by making its members more learned than they would be without the many advantages which the Society now affords.

ENGLISH LAW OF COPYRIGHT.

We have been informed on good authority that the Provincial Act 10 & 11 Vic cap. 28, to which we referred in our last issue as being inconsistent with the Imperial Act 5 & 6 Vic. cap. 45, was disallowed by the Queen.

It is well that this fact should be known to all in any manner concerned in the subject of our remarks. It does not seem to have been known to the Commissioners when consolidating the Statutes of Canada. They appear to have incorporated all the provisions of 10 & 11 Vic. cap. 28, in chapter 81 of the Statutes of Canada. The result is that the greater part of that Consolidated Statute is not only not law but calculated to mislead. The sooner the condemned portions of the act are expunged from the pages of the Statute Book the better.

We cannot understand why our Legislature should not be allowed to amend our laws, including Imperial statutes, directly or indirectly made to apply to us—especially in matters of local concern. If we have the right to enact a copyright law, we should also have the power to alter the terms of an English statute on the subject which is in conflict with our ideas and our wants.

LAW SOCIFTY OF UPPER CANADA.

HILARY TERM, 1861.

EXAMINATION FOR ATTORNEYS' ADMISSION.

WILLIAMS ON REAL PROPERTY.

1. Explain the feudal system, and state the effect of its introduction into England.
2. What are the rights of married women, with respect to real estate?
3. What are the limitations upon a mortgagor's right to redeem? and how is this affected by statute?
4. Distinguish between the different kinds of conveyances and their operation.
5. Explain the effect of the provisions of the Statute of Frauds upon interests in real estate.

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between a bill for account and an action of account at law?
2. Give the principal rules attending the administration of assets in equity.
3. Distinguish between revocable and irrevocable assignments.
4. When is misrepresentation fraudulent.
5. Under what circumstances will a purchase be deemed a trust?

SMITH'S MERCANTILE LAW.

1. Can there be a binding verbal agreement to renew a bill or note? Will it make any difference in the validity of such agreement whether it was contemporaneous with the executing of the instrument or not? Give your reasons.
2. What is the general effect upon a creditor's claim of his taking his debtor's bill or note for the amount; and what would be the effect of the creditor negotiating such bill or note? Will it make any difference in the effect of his so negotiating it whether he does or does not render himself liable on it?
3. Has one partner in a firm of Attorneys an authority to bind his co-partner by a negotiable instrument? Give your reasons.
4. Will a warranty made after a sale be binding? Give your reasons.
5. What is particular and what general average?

BLACKSTONE, VOL. 1.

1. When was the Habeas Corpus Act passed?
2. What is comprised in the right of personal security?
3. What is the definition of municipal law?

STATUTES, PLEADINGS, AND PRACTICE.

1. Give briefly the statutory provisions affecting the exercise of the jurisdiction of the Court of Chancery in this Province.
2. What is the effect of an order for the production of documents?
3. When does publication pass?
4. What changes have the general orders made as to parties?
5. In what cases can a suit within the jurisdiction of the superior courts be sent for trial by a county court judge?
6. In what cases can mesne profits be recovered in the action of ejectment?
7. In what cases and under what circumstances can a writ of replevin issue without leave of a judge?
8. What facts must a plea disclose to amount to a good equitable plea?
9. Under what circumstances can the court or a judge order a person not originally joined as plaintiff in an action to be so joined?

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. What are the various kinds of tenures?
2. In the deduction of a title why are sixty years required?
3. Give the effect of the provincial statute as to barring estates tail.
4. How do voluntary conveyances stand with respect to purchasers and creditors respectively?
5. Distinguish between a stipulation to diminish, and a stipulation to raise interest respectively?

STORY'S EQUITY JURISPRUDENCE

1. How are purchases from persons in fiduciary relations regarded in equity?
2. What consequences result from the principle that a surety is entitled to all the securities of the creditor?
3. Distinguish between actual and constructive notice?
4. In what cases will an interpleader lie at law and in equity, and when not?
5. What is the doctrine of election?

TAYLOR'S EVIDENCE.

1. When is more than one witness necessary?
2. What is the rule as to the competency of witnesses, and wherein does the law of Canada differ from the law of England in this respect?

3. What writings is a witness not bound to produce?

4. How far is a witness compelled to answer questions degrading in their nature?

5. When are admissions evidence?

BYLES ON BILLS.

1. What warranty results from the transfer or endorsement of a bill or note?

2. When are the various kinds of bills to be presented for acceptance and payment respectively?

3. When may presentment be excused?

4. What is the effect of the alteration of a bill or note?

5. When does the acceptance of a bill or note operate as a satisfaction, and when not?

SMITH'S MERCANTILE LAW.

1. Is there any, and if so, what difference in the effect upon the contract of sale between a breach of warranty made on the sale of a specific chattel and of unascertained goods?

2. In the ordinary case of a sale at auction, what is the writing to satisfy the Statute of Frauds?

3. What is the duty of the insured in a marine policy when he wishes to treat the injury done to his vessel as a constructive total loss; and under what circumstances is he entitled so to act?

STEPHENS ON PLEADING.

1. In what order must pleas of different degree be pleaded, and what is the effect of pleading any of them on a defendant's right to plead one prior in degree?

2. What is a new assignment, and in what cases is it necessary?

3. What is the effect of demurring to a pleading, as regards the facts stated in the pleading demurred to?

4. Show how *liberum tenementum* amounts to a good plea in confession and avoidance.

ADDISON ON CONTRACTS.

1. Is there any, and if so, what difference between a contract partly legal and partly illegal, and a contract founded partly on legal and partly illegal consideration?

2. How do simple contracts, negotiable instruments, and contracts under seal, differ with regard to proof of the consideration on which they are founded?

3. Enumerate the contracts required by the Statute of Frauds to be in writing.

STATUTES, PLEADINGS AND PRACTICE.

1. When a cause has been sent from one of the superior courts to the county court, what steps should be taken to prevent entering judgment if it is desired that the case should stand for motion in the superior courts?

2. What notice of appeal to the Court of Error and Appeal must be given to the opposite party, in cases in which notice is necessary?

3. What is the statutory rule with regard to speeches of counsel at Nisi Prius?

4. In what cases can a submission to arbitration be made a rule of court?

5. What is the course to be pursued where several causes of action have been joined, if, in the opinion of the judge, they cannot be conveniently tried together?

6. To what extent and of what facts is a protest, by the law of Upper Canada, evidence?

7. When may a statute be relied upon as a ground of demurrer, in equity, and when not?

8. What are valid objections to discovery?

9. When will a writ *ne exeat* be granted?

10. When may the court proceed without a personal representative?

11. In what cases will a receiver be granted?

EXAMINATION FOR CALL WITH HONORS.

DART ON VENDORS AND PURCHASERS.

1. Who are generally and relatively incompetent to purchase or sell respectively?

2. When is a purchaser entitled to compensation?

3. Distinguish between dependent and independent stipulations in a contract of sale: state their effect: and illustrate by examples.

4. When will the execution of a contract, partly varied by parol, be decreed?

5. Does a purchaser of real estate in this country, from the heir-at-law, take the estate free from or subject to the simple contract debts of the ancestor? Give reasons for your answer.

STORY'S CONFLICT OF LAWS.

1. How is the capacity of a person affected by change of domicile?

2. Upon what principle are the laws of one country recognised by another? Illustrate by reference to bankruptcy, and laws of a similar character.

3. Show how the *lex loci actus* or *contractus* is to be considered with respect to the disposition of moveable and immoveable property, situate within another state or jurisdiction?

4. What is the effect of a foreign probate and administration upon assets in this country?

5. What force and effect has a foreign judgment (*Exceptio rei judicatæ*) and give the opinions of different jurists upon this question.

JARMAN ON WILLS.

1. Distinguish between conditions precedent and subsequent?

2. What is the rule of construction of the word "heir" in a gift to him of both real and personal estate?

3. When may "survivor" be construed "other?"

4. When a bequest is made to A. with a gift over, in case of his death, what is the effect of it?

5. What is the effect of a gift over, in default of issue, with respect to personal and real estate respectively?

JUSTINIAN'S INSTITUTES.

1. Translate Lib. 14., Tit. 6, sec. 1, and give explanatory notes upon the legal terms used therein.

2. What was the jurisdiction of the Prætor with respect to *damnum infectum*?

3. Classify servitudes.

4. What is the *capitis diminutio*? how may it arise?

5. Explain *addictio, arragatio, interdictio, exceptio, depositum, delegatio, peculium.*

6. Give an outline of the Roman law treated of in the Institutes.

STORY ON PARTNERSHIP.

1. To what extent can partnership property be seized for the debt of a single partner, and what interest is acquired by a purchaser at a sale under such an execution?

2. If an infant either actually becomes, or holds himself out as a partner, what will, in either case, be his position on arriving at full age with regard to parties dealing with the firm?

3. In what ways can a partnership be dissolved?

4. If the firm of A. B. C. are the holders of a negotiable instrument made by the firm of C. D. E., can they sue the latter firm upon it? Upon what principle does this depend?

5. What is the position, with regard to the partnership, of the personal representatives of a deceased partner?

RUSSELL ON CRIMES.

1. What is the distinction between murder and manslaughter, and what is the presumption in all cases of homicide?

2. What is the common law definition of forgery, and what class of crime does it amount to? How does it, in this respect, differ from forgery by statute?

3. Where money is given to a servant by his master for a specific purpose, and the servant converts it to his own use, does this amount to embezzlement or larceny? Give your reasons.

4. Can an indictment, in any case, be sustained against several persons for conspiring to do that which would be lawful for them to do individually? Give your reasons.

5. In what cases is a wife not excused from criminal responsibility when acting under the direction of her husband?

COOTE ON MORTGAGES.

1. What is meant by tacking?

2. What is an equitable mortgage, and how can it be created?

3. If it is desired that the mortgagee should pay a greater amount of interest in the event of the interest not being punctually paid, is there any, and if so, what means of effecting such intention?

4. What is the position of a lessee, under a lease from a mortgagor made after the mortgage, as regards the mortgagee?

5. If two persons advance money on mortgage, and one dies, to whom will the debt belong?

SELECTIONS.

THE LIABILITIES OF RAILWAY COMPANIES AS CARRIERS.

The plain and simple principles of the common law have been severely tried in their application to the enormous extension of traffic and complicated transactions produced by the railway system. Contracts and wrongs, the two main branches of common law jurisdiction, appear in new shapes not easily recognised by the light of ancient rules and authorities. The law of carriers, occupying as it does an anomalous position with reference to this division of common law jurisdiction, not being exclusively assignable to either branch, or, in modern statutory language, "partaking of the character of both," was always, for this reason, a complex and embarrassing subject and required a liberal use of fictions and technicalities to preserve it from confusion in its administration. The native complexity of the subject, however, has been extraordinarily aggravated by the novel complications which have called for an application of the law; and in several instances extraordinary remedies have been devised to meet the emergencies which have arisen in the progress of railway traffic.

The duties and liabilities of railway companies as carriers of goods have been brought to something like a settlement by the Railway and Canal Traffic Act of 1854. Under this Act a quite new common law jurisdiction was instituted—not remedial, but mandatory, exercising a regulative supervision over the action of railway companies as carriers, for the purpose of securing to the public all reasonable facilities for traffic upon equal terms, and of preventing any undue favour or preference. The Act also restricts the common law right which carriers, by railway or canal, equally with the rest of the world formerly enjoyed of making what special contracts they might think fit, by annexing the statutory proviso that the terms of their contracts must be such as, if called in question, a judge shall deem to be just and reasonable. Their position, as carriers of goods, may be described broadly as still resting on the basis of the common law, with the restrictive incidents thus imposed by the statute, that they must deal on equal terms with all, and that the limitations of their liability by special terms and conditions must be reasonable. On the whole, the system appears to act well, and certainly abundant liberty is reserved to the companies for the protection of their interests.

As carriers of passengers, the duties and liabilities of railway companies show similar deviations from the common law. It is remarkable that this branch of traffic was considered by the original projectors of railways of far less importance than the carriage of goods; but on the opening of railways was at once found to constitute their chief and most lucrative business. This unforeseen extension has given birth, in a corresponding manner, to unforeseen difficulties in its legal incidents, which have not yet been fully recognised or adequately provided for. The Railway and Canal Traffic Act applies equally to the traffic in passengers and to the traffic in goods; and its operation seems equally necessary and salutary in both cases. But besides this Act, Lord Campbell's Act for compensating the families of persons killed by accident, imposses a new and serious liability upon railway companies in regard to their passenger traffic. The recent fatal collisions on the London and Brighton and North London Railways have unfortunately given a wide field for the operation of this statute, and have directed an unusual degree of attention to its provisions. A few observations upon its policy and results will therefore, it is hoped, at this time be found not inappropriate.

The common law was not so stringent with carriers of passengers as with carriers of goods. The passenger carrier was bound to carry all comers who tendered themselves in a suitable state, both as to person and pocket, so long as he had accommodation to carry them; but beyond this there was no duty or liability except as provided by the terms of the contract. The carrier of goods was under a similar liabiliy to carry, and was also an insurer of the goods received for carriage, which he was bound to make good if they were damaged or lost from any cause during the transit. The carrier of passengers was not an insurer, and was only liable for injuries to the passenger occasioned by the carrier's negligence; and in case of the death of the passenger all liability for negligence died with him. In theory the law remains unaltered in respect of the passenger carriers being liable for negligence only; but under the railway system the practical impossibility of a railway company escaping the imputation of negligence, combined with the extended consequences of negligence imposed by Lord Campbell's Act, render the railway carrier of passengers in effect an insurer; at least, every passenger may travel with a well-grounded confidence that in the event of accident his life is insured for the benefit of his family.

Lord Campbell's Act has now been tested by an experience which for a modern statute may be pronounced long. The result of this experience, and of much consideration of the statute itself leads us to the belief that however valuable it may have proved as a palliative for a pressing evil, it is not sufficiently complete and comprehensive for permanent use, or a

least is capable of considerable amendment. We say this not in any spirit of disparagement of its late distinguished author, to whom is due the credit of having provided some practical remedy for an evil of present urgency, but as a comment upon the Act considered as a piece of legal mechanism which we are induced to make in the interests of law, and which we think will be found to be justified by fair argument and criticism. This statute, however, may be referred to in passing, as a characteristic specimen of the rough and ready, but not always scientific workmanship of its author, while the great popularity with which it has been received may be also notified as an appreciation of his services. As, however, the tendency of the enactment is all in favour of the public and against railway companies, its popularity is sufficiently accounted for without accepting it as any proof of the strict equity of the measure, still less of its perfection as a specimen of jurisprudence.

In criticising the act as the work of the Legislator, common fairness requires that a due regard should be paid to the antecedent state of the law, and the occasion which called for it. It was professedly a substitution for the ancient system of deodands. By the ancient common law, in case of death by accident, the instrument of death was forfeited as a deodand, to be disposed of for the benefit of the soul of the deceased. The specific deodand was gradualy converted into a pecuniary fine assessed by the jury as the value of the instrument, in place of which it was paid; and this fine became forfeited beneficially to the crown, or the lord of the manor, after the ulterior purpose to which it was formally applied had been declared superstitious. Juries, however, were naturally disinclined to inflict a fine in this manner and with this destination, and gradually took upon themselves to diminish the amount, until the practice prevailed of assessing the deodand at an amount merely nominal. Upon the introduction of railways, however, their feelings were excited in an opposite direction, and they vented their indignation at the supposed negligence of railway companies by an exercise of their long dormant power of assessing the deodand at a substantial amount. This attempt to revive deodands was found to be quite alien to the spirit of the age, and quite inadequate to the requirements of the occasion; and at the same time the novel apprehensions excited by railway accidents called urgently for some legislative interposition. Accordingly, deodands, which had become practically obsolete, were abolished by statute, and in their stead was enacted the statute, which now passes by the name of the late Lord Chancellor, which was thus inspired by the twofold intention of providing a suitable penalty in place of the deodand, for the cause of death, and of appropriating the amount of the penalty by way of compensation to the relatives of the deceased.

The statute is now no longer to be considered on historical grounds, and only with reference to the purpose which called it forth. It retains a prominent place in our statute book, and occupies a position of serious importance in our social system. It must stand or fall by its own merits or demerits with respect to the circumstances of the present day, and by its intrinsic capacity to fulfil the functions which it undertakes to discharge. In this view we propose to discuss it, and we may fairly take as a test its manner of dealing with the relation between railway companies and their passengers, which is by far the most important and frequent subject of its operation, and that which it was most particularly designed to regulate. As the subject, we find, is too extensive for our present limits we must reserve our observation on the details of the measure for another week, and confine our attention at present to a single point. It is a point, however, of vital importance, as it touches the very groundwork and principle of the statute.

Before this act came into operation, the action for damages caused by negligence, which resulted in death, was barred by the maxim of the common law; "*actio personalis moritur cum persona.*" This maxim was originally universally applicable to all actions for wrongs, whether to person or property; but the superior wisdom of after ages appear to have interpreted it as exposing the deficiency rather than expressing the policy of the common law, and to have arrived at the conviction that in common justice every vested right of action, so far as practicable, should pass to the representatives of the deceased party entitled. Rights of action in respect of injuries to property, real and personal, had already been thus secured to the deceased's estate by successive enactments; but rights of action in respect of injuries to the person had remained hitherto extinguished, as at common law, by the death. Was it then the policy of the statute to supply this defect of the common law in a similar manner in respect of rights of action for personal injuries? Does the statute in effect operate by transferring the deceased's right of action to his estate or representatives? or does the statute leave the common law untouched, and create an entirely new cause of action? The language of the enactment will be found most undecided and ambiguous upon this point, which nevertheless we venture to suggest is a point of serious importance, and one which goes to the very root of the claim. The question has on one occasion been incidentally mooted, but not in a manner to require a decisive examination. It may be safely predicted, however, that it will one day again present itself to the judges in a manner which will demand a solemn decision. We have only to suppose the very probable case, that a person injured in a railway accident should accept compensation from the company in satisfaction of the cause of action, and after receiving satisfaction should die of the injury, and that claim under the statute in respect of his death should afterwards be prefered by his representatives against the company. The questions might then be raised; would the right of action against the company for their negligence be wholly discharged by the satisfaction made to the deceased? or would the representatives of the deceased acquire a new and distinct cause of action notwithstanding the satisfaction?

In whichever way the point is decided, the results will be remarkable; if the action in question is that of the person injured, the company by a speedy adjustment of their claims for compensation may often avoid the more serious liability arising upon the death; if on the other hand the action is that of the representatives, the company may be actually compelled to pay full compensation to the deceased, and yet remain liable for damages to his relatives, who at the same time, may be the very persons who have become entitled by the death to the previous compensation.

The fact that this question is left open to argument on the face of the statute is a conclusive proof that in framing its provisions their bearing upon the previous state of the common law did not receive a due measure of consideration. Attention appears to have been directed too exclusively to the avowed objects of replacing the ancient deodand by other form of penalty and providing for its distribution amongst the family of the deceased. It appears to have been overlooked, that the party injured, if he survived a sufficient time for the purpose, might himself have his action for the negligence of the company, and recover compensation, which, in case of serious injury might and probably would be greater in amount than that assessed upon his death. It could scarcely have been intended that the company should suffer the penalty for their negligence twice over; nor on the other hand that by a speedy settlement with persons slightly injured they should be enabled to escape the risk of ultimate liability to the family in case of death. The liability of the company ought at any rate to be adjusted on such terms as would avoid these uncertainties; and the statute requires a corresponding amendment. What particular form of amendment is expedient, and upon what principles the liability of the company should be finally adjusted, are questions to which we can only attempt an answer after a full consideration of all the provisions of the statute which we are compelled to postpone to a future occasion.—*Jur.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office.

All other Communications are as hitherto to be "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 281.)

Not only the Town, Village, or place is to be appointed, but the particular building in which the courts are to hold their sitting should be designated by the judge. In England court-houses are provided, furnished, and maintained at the public expense, for holding similar courts to our own.*

No such provision has been made for the Division Courts, and the voluntary and gratuitous aid of the Municipalities or residents of a Division, is commonly invoked to secure a place for holding these courts, the Legislature neither by a tax on the suitors, (as is done for the Superior Courts at Osgoode Hall,) nor otherwise having supplied the necessary funds.†

There are many and grave objections to holding a court of justice in a tavern, and the sittings should not be held in such a place if it be possible to procure another for the purpose. The practice of transacting public business of a *quasi* judicial nature in a tavern has been emphatically condemned by the Legislature in a provision of the Municipal Act, which expressly prohibits the holding a Municipal election in a house of public entertainment where spirituous liquors are sold‡ and the principle of such a prohibition applies with greater force to courts of justice. The reasons that induced the legislative provision should prevail with the judge to keep his courts out of taverns.§

In determining then where the sittings of the court are to be held; it becomes necessary to ascertain what building accommodation can be secured for the *decent* and *orderly* conduct of business. If a Town or Township Council Chamber, School-house or other public building in a Division, will be placed at the disposal of the officers of the cou on court days, lighted and warmed as occasion requires it should be chosen. The appointment of two places in a Division for holding the court alternately, seems warranted by the very broad language used in section six. "The judge may appoint and from time to time alter the time and places within such Divisions where and at which said courts shall be holden." And although such an arrangement tends to produce errors and confusion in the business, cases may occur where the public convenience can possibly be served

* The English Statute 19 & 20 Vic., cap. 108, sec. 85, provides that "the expen- "ses of building, purchasing or providing any messuages and lands for the purposes "of the County Courts, and of repairing, furnishing, cleaning, lighting, and "warming the court-houses and offices, and of payment of the salaries of neces- "sary servants for taking charge of such court-houses and offices, and of supply- "ing the courts and offices with law and office books and stationery and postage "stamps, and the disbursements of the high bailiffs in conveying to prison per- "sons committed by the Courts, and all other expenses incident to the holding of "the said courts, shall be paid by the Commissioners of Her Majesty's Treasury "out of any monies to be from time to time provided for such purposes." Cox. C C., p. 5.

† Mr. Justice Burns, an early friend of the Division Court system, and at one time a County Judge, in proposing some amendments in our system in a letter published by him in 1847, thus refers to the subject. "The clerks in the Division "Courts of the Province as the law stands, are compelled to furnish at their own "expense, the books necessary for the records of the court; and yet these books "are made public property. This has always appeared to me to be very unjust to "the clerks. It will be seen that by the English Act such an expenditure can be "provided for. There has been another oversight committed in our Act in not "allowing the judges to permit the clerks to retain other current expenses of the "courts, such as for fuel, lights, and the use of rooms to hold the courts in. "It has happened that the judge has been obliged to adjourn the court after "going to the place appointed for it, because the person at whose house it had "been holden took it into his head to withhold the premises. It has also "been the case that the judge has been obliged to pay out of his own pocket for "fuel to warm the room; and when he has been unable to finish his cause list "before dark, to pay for candles rather than adjourn over till next day. No one "could imagine that either the judge or clerk should pay these charges, or should "be obliged to furnish a room. It is true that the hospitality of the people in the "country is great in respect of these accommodations; but it is not right that the "courts should depend upon that, or that it should be expected that individuals "should furnish such things gratuitously for the community. There must have "been an oversight in the Legislature which I should propose now be remedied "by merely adopting the provisions of the English Act." The Act referred to by Judge Burns, was the County Court Act of 1846, and at a later period the following remarks appeared in the *U. C. Law Journal*: "The Division Courts are not "private establishments, they are public tribunals for the administration of jus- "tice, established by l r, regulated by law, and for the benefit of the whole com- "munity. * * * In the Superior Courts offices are provided for the officers at "the public expense, and all accommodation necessary for due and regular ad- "ministration of justice. But the Division Courts, to which the main body of "suitors resort, are left entirely unprovided for. Why this invidious distinction— "why this strange anomaly? All courts of justice are equally under the State, "and all should be placed on the same footing. The suitors in the small courts "pay quite as much in proportion towards the maintenance of the tribunals they "resort to as suitors in the superior courts. Let at least their own money be ap- "plied for their own benefit, if the necessary expenses we have referred to are not "disbursed from the public purse. There is something decidedly wrong in the "state of things which throws upon the clerk of a court the expense of renting "a building in which a public court is to be held. There is no more reason that "he should do so than any suitor in the court. Every dollar disbursed in this "way is so much of a contribution from the individual clerk towards supporting "the administration of Justice. Is the Country too poor to support the necessary "establishments? If it be then let not the court fees be applied to any other "purpose than the support of the courts in which they are collected. The Divi- "sion Court clerks are not over-paid by any means; and yet that 'all things may "be done decently and in order' in the courts they are connected with, they must "put their hands in their pockets and pay for public property and public accom- "modation. We look upon it as exceedingly unfair that this *forced benevolence* "should be squeezed out of clerks; and the instances are very numerous. Occa- "sionally town or township hall, or other building belonging to some private "association, is allowed to be used for holding Division Courts; but in all such "cases it is a mere matter of sufferance and courtesy, and the privilege is at any "moment liable to be refused, by which much unseemly trouble and annoyance "might be caused to officers and suitors." U. C. L. J., Vol. 5, p. 81.

‡ Municipal Act, sec. 81.

§ "Division Courts are often obliged to be held in taverns; and we know of more "than one instance in which tavern keepers have gone to the expense of erecting "a building for their accommodation. The inducement for doing this is easy to "conjecture, and the effect produced by the contiguity of a bar-room on the order "and decorum of the court may be imagined." U. C. L. J., Vol. 5, p 81. Far better would it be in the interests of order and morality to hold a court in a school house or other like place in the most remote corner of a Division, than in the very centre of it in a tavern

by shifting the place of sitting from one place to another, and back again.

It will be seen from the foregoing consideration, that no general rule can be proposed as to the place where the sittings of a court should be held in a Division, the question as it arises in each case must be settled with reference to the particular circumstances involved.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—In a certain Division Court East of Kingston, a judgment was given upon a state of facts, which I shall detail, upon which judgment your opinion would be read with pleasure by the parties interested, and others.

The facts condensed are these: A. hands a note to B. a lawyer, to collect. B. notifies D. the defendant; D. goes to a bailiff of the court and gives a confession. B. hands in the claim to the clerk of the court for suit. The clerk issues a summons, and the defendant is sued in the usual way.

The case comes on for trial—the judge decides that the bailiff had no *right* to take such confession under the statute; but notwithstanding having taken it the clerk should not have issued a summons but should have annexed the claim when it came for suit to it, and then have treated it as an ordinary confession of judgment—gives judgment for the plaintiff, the clerk and bailiff each to pay a *moiety* of the costs for blundering. Who, think you, blundered—the judge, the clerk, the bailiff, or did they all do so? What think you of the judgment?

Yours truly, D.

[The 117th sec. of the Act respecting Division Courts, 22 Vic. ch. 19, provides, that "any bailiff or clerk *before or after* "*suit commenced* may take a confession or acknowledgment "of debt from any debtor or defendant desirous of executing "the same," and we apprehend that in the case mentioned by our correspondent, the bailiff had this provision in view, and if he complied with the directions given in the rule regulating the practice in such cases, he certainly was justified in taking the confession.

The 31st rule provides, that "every confession of debt taken "before suit commenced must show thereon, or by statement "thereto—attached at the time of taking them, of the par- "ticulars of the claim or demand for which it is given" &c., and also that "unless application for judgment on such con- "fession or acknowledgment shall be made to the judge "within three calendar months next after the same is taken, "or at the sittings of the court next after the expiration of "such period, no execution shall be issued on the judgment "rendered without an affidavit by the plaintiff or his agent "that the sum confessed, or some and what part thereof "remains justly due, and application for judgment shall be "made at a court holden for the Division wherein the confes- "sion or acknowledgment was taken."

The intention of the Legislature is evidently to afford the debtor every facility for avoiding the payment of costs, but although approving of the motives, we doubt the wisdom of the provision on account of the evident difficulties in the way of carrying it into effect so as to insure the intended benefit to the debtor. However, the discussion of the merits of the enactment is foreign to the question before us at present, although we should be glad to return to it again in that aspect if any of our correspondents would take it up.

In the case put by our correspondent, if we assume (as we have a right to do, nothing being said to the contrary,) that the bailiff in taking the confession followed the practice prescribed by rule 31 in respect to annexing a proper statement of claim thereto, we must allow that he acted within the bounds of his duty; and it became the duty of the clerk to receive the confession and claim and await the action of the creditor thereon, and his mode of proceeding in such a case is clearly pointed out by the above rule.

Unless "D." has overlooked or neglected to state some material fact, we do not see how any blame could attach to the bailiff, and if it did not, then the action of the clerk in issuing a summons was clearly wrong. Instead of doing so he should have made the plaintiff or his agent when putting in the claim, aware of the fact that a confession had been already given.

If the bailiff took the confession without the required formality, it seems to us that the clerk might be excused for thinking himself justified in treating it as a nullity, although it might happen that legally he was not so.—EDS. L. J.]

November 28, 1861.

To the Editors of the Law Journal.

GENTLEMEN,—A. holds a judgment, on which execution has been returned "no goods." against B., who afterwards absconds. C. swears out an attachment against the goods of B., hunts up and seizes property. At the next sittings of the Division Court, as soon as C. recovers judgment, A. directs the clerk to issue an alias execution on his judgment. The clerk makes out both executions and hands them to the bailiff at the same time. The bailiff, having read the endorsement on C.'s execution first, marks it 1, and A.'s 2. The property attached is then sold, and the proceeds paid into court. To which party, A. or C. is the clerk to pay over the money?

An answer in the next *Journal* will much oblige

A DIVISION COURT CLERK.

[Our correspondent is referred to the clauses of the Division Courts Act regulating the proceedings against absconding debtors, where he will find that the proceeds of the sale of the absconding debtor's goods and chattels in such cases, are to be ratably distributed amongst such of the creditors as have obtained judgment against the debtor, in proportion to the amount really due upon such judgments.

A. seems in this case to be in the same position as he would have been if he had commenced proceedings but had not obtained a judgment before the attaching creditor. The return of his execution *nulla bona* and the *fi. fa.* having been as it were received after C.'s writ would, we think, deprive him of any advantage of priority his prior judgment might have given him. The Absconding Debtors Act allows any person who may have had process served before an attachment issued to have the full benefit of his *execution* if he obtains one before the attaching creditor, but this provision is not found in the Division Court Act, and even if applicable thereto, would not we think, change the aspect of the present case, as A. had no execution in force when C.'s was issued.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

HENDERSON v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Horses escaping on Railway—Plaintiff's possession of close.

The plaintiff owning land adjacent to the railway, permitted one D. a servant of the company living within their fences, to cultivate a small piece free of rent. D. made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the railway track and were killed.

Held, affirming the judgment of the county court, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle him to recover. (E. T., 24 Vic.)

This was an action in the County Court of the United Counties of Frontenac, Lennox and Addington, to recover damages from

the defendants for unlawfully, and negligently, and injuriously omitting and refusing, pursuant to the statute in that behalf, to erect and maintain sufficient fences on each side of their line of railway of the height and strength of an ordinary division fence, by means whereof two mares of the plaintiff lawfully depasturing and being in a certain close of the plaintiff adjoining the said railway of the defendants, strayed from the said close into and upon the said railway, and were there run over and killed by a certain locomotive steam-engine and carriages of the defendants.

The second count was for neglect in erecting and putting up fences on each side of defendants' railway, by reason of which omission and neglect in erecting and maintaining the same according to the statute in that behalf, a horse of the plaintiff depasturing in a certain close of the plaintiff adjoining the said railway of defendants, escaped and strayed from the said close of the plaintiff into and upon the said railway, and was there run over and badly injured by the locomotive steam-engine and carriages of the defendants, whereby the plaintiff lost the use of his said horse for a long time, to wit for the space of two months, and was thereby otherwise greatly damnified.

There were four counts in the declaration, varying the injury complained of, and the defendants pleaded not guilty to the whole declaration; and 2ndly, to each count of the declaration, that the defendants did erect and maintain on each side of their said line of railway fences of the height and strength of an ordinary division fence.

The plaintiff took issue on the several pleas, and the case was tried at the last December sittings of the county court, and a verdict rendered for the plaintiff, and $165 damages.

On the trial it was proved that the horses were at pasture in a field on the plaintiff's farm, and that from defect of fences they strayed from that field into a small piece of ground belonging to the plaintiff immediately adjoining the railway track, which the plaintiff had permitted one Patrick Daly, a servant of the defendants residing in a small house at the Gananoque railway station, to use free of rent for the purpose of raising a few potatoes and vegetables for his own use. It was proved further that Patrick Daly had opened a small gate in the railway fence for the purpose of passing to and fro from his own house inside the railway fence to the ground adjoining on the outside, which he cultivated with the assent of the plaintiff as a mere matter of indulgence.

It was shown that the tracks of horses were seen through that gateway from the plaintiff's premises adjoining, and there seems to be no doubt from the evidence that the horses came from the plaintiff's field to that portion of the plaintiff's land worked by Patrick Daly, and then that they strayed from thence through the gate which Daly had made for his own convenience in the railway fence close to his house, and so got on the railway track, and were killed or injured by a locomotive and carriages passing along the line of railway.

The defendants' counsel called no witnesses, but objected to the plaintiff's case, that according to the evidence the horses broke into Daly's garden first, and then escaped from it to the railway, and not from the plaintiff's close as alleged in the declaration. 2. That there was no evidence of the ordinary height of division fences in the township of Leeds. 3. That there was not evidence of the killing; and 4. That there was no evidence to support the second count.

The learned judge overruled these objections, and the case went to the jury with a charge as to the nature of the possession of the ground on the plaintiff's farm from which the horses had strayed or escaped to the railway, to which no objection was made on either side. He told the jury that if Daly had such a possession as entitled him to hold against the plaintiff for any time, however short, then the plaintiff could not maintain this action; that he must have a right to the exclusive possession, so that the horses must have passed from premises over which he was entitled to exercise entire control, to enable him to sue for injury arising from want or defect of fences on the part of the defendants; that if Daly was merely working the ground as a matter of indulgence, having no right to do so except at the mere will and pleasure of the plaintiff, then the plaintiff must be regarded as still in possession, and entitled to enter at any moment on his land without being liable to any one for damages in doing so. The jury found for the plaintiff, after a full explanation of the law as to the necessity of the plaintiff being in possession of the land to entitle him to sue for the damages sought to be recovered in this action.

A rule nisi was obtained for a new trial on the grounds previously urged by defendants against the plaintiff's right of action, and from the judgment discharging this rule the defendants appealed.

Bell (of Bellville) for the appellants, cited *Walker* v. *Great Western R. W. Co.*, 8 U. C. C. P. 164; *Gillis* v. *Great Western R. W. Co*, 12 U. C. Q. B. 427; *Dolrey* v. *Ontario, Simcoe and Huron R. R. Co*, 11 U. C. Q. B. 100; *McLellan* v. *The Grand Trunk R. W. Co*, 8 U. C. C. P. 413.

Britton, contra, cited *Doe dem. Warren* v. *Fearnside*, 1 Wils. 176; *Bertie* v. *Beaumont*, 16 East 33; *Doe James* v. *Stanton*, 2 B. & Al. 373; *Leith* v *O'Neill et al*, 19 U. C. Q. B. 233.

McLEAN, J.—*The case of Henderson* v. *Harper in our own* court (1 U. C. Q. B 481) shews that a tenant-at-will cannot set up such tenancy against his landlord, and that the entry on the land by the owner, and turning out his tenant at will, are justifiable for the purpose of terminating the tenancy at any time the owner may think proper. The possessor of a parcel of land may maintain trespass against a stranger, but the owner will also be entitled to sue for any injury to his land, though it may be occupied by a tenant-at-will who merely holds without any interest derived from the owner. Though at first I was inclined to think that Daly must be regarded as in possession of the ground through which the horses passed to the railway, and therefore that the plaintiff could not maintain this action, I am now satisfied that the direction of the learned judge in the court below was correct, and that the plaintiff's action is sustainable. The defendants are bound by law to keep up fences to prevent horses and other animals from getting on the line of the railway, and if one of their own servants destroys or removes a portion of their fence, and injury is thereby caused to an adjoining proprietor, the defendants cannot excuse themselves by shewing that the injury was caused by the wanton and unauthorised act of their servant. The fact of the servant having been the cause of the injury to the plaintiff may have been the cause of increased damages, but they are not so large that they must necessarily be characterised as excessive. On all the grounds taken it appears to me that the verdict is right, and that the appeal must be dismissed with costs.

BURNS, J.—There was no complaint made of the way in which the judge of the county court left the case to the jury. He correctly enough told them that it was necessary, in order to the maintenance of the action, that the plaintiff should be in possession of the piece of ground from which the mares escaped upon the railway. In his judgment afterwards, in disposing of the rule to set aside the verdict, he remarked that the question of possession was one of fact for the jury, and this proposition cannot be denied.

The case of *Wildbor* v. *Rainforth* (8 B. & C. 4) very strongly supports the judge's view of this case. That was an action of trespass brought by the widow of a pauper who had been permitted to occupy a house rented by the overseers of the poor. Mr. Justice Bayley said that the plaintiff was merely an occupier by sufferance, and Lord Tenterden said the plaintiff was not tenant of the premises, but was allowed to occupy by the parish officers and that her occupation was theirs.

It would be a very hard measure of justice indeed upon this plaintiff if we should be compelled to say that the judge had done wrong in refusing to grant a new trial, for the whole cause of the accident was occasioned by the servant of the railway company putting a gate in the fence, which he ought not to have done, and then negligently either leaving it open, or in such a way that the slightest touch must have opened it, so that by it the animals escaped to the railway track. I do not think we are obliged to find fault with the manner in which the judge has dealt with it in the court below, and, as expressed by Lord Kingsdown in the case of the *North American*, (12 Moore, P. C. 338,) and repeated by Lord Chemlsford in the *Schwalbe*, (4 L. T. Rep. N. S. 160,) "In order to advise the reversal of a judgment we must not merely doubt whether it is right, but be satisfied that it is wrong." The appeal should be dismissed with costs.

Per Cur.—Appeal dismissed.

In the Matter of Simmons and The Corporation of the Township of Chatham.

By-law—School Sections—Uncertain boundaries—Coloured people

A by-law recited that certain coloured inhabitants had petitioned for an alteration of school section No 9, and for the establishing of two separate schools for coloured people in the township, and that it was expedient to grant their request, by defining the boundaries of said sections, so as to include the coloured inhabitants of the township; and it set out the limits of each section to be established, the last boundary of No 1 being, "thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in the front part of the said township of Chatham," and the last boundary of No 2, "thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in that part of the said township not included in the section No 1, as described in the first section of this by law"

Held, that these boundaries were indefinite and fluctuating, and that the by-law was therefore bad

Remarks as to how far the court are bound to quash by-laws, even when moved against properly and found bad.

J. Wilson, Q.C., obtained, in Easter Term last, a rule upon the corporation to shew cause why their by-law No. 9, passed in 1854, for altering school section No. 9, and establishing two separate school sections for coloured people, in the township of Chatham, should not be quashed, on the ground that the clauses establishing school section No. 1, for coloured people, are vague and uncertain, in attempting to include in that section, beyond its specified limits, every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in front of the said township, which leaves it always uncertain where and what the section is, making its limits contingent on the occupancy of lots by coloured persons.

This arrangement, it was contended, was not warranted by the school acts, which contain no provision for making the colour of the inhabitants a description or definition of boundary.

The by-law recited that certain coloured persons had petitioned for an alteration of school section No 9, and for the establishing of two separate schools for coloured people in the said township, and that it was expedient and just to grant the prayer of their petition by altering section No. 9, and establishing two separate schools, and by defining the boundaries of the said sections, so as to include the coloured inhabitants of the said township and North Gore.

And it enacted that the boundaries of the then existing separate school section established for coloured people should be as follows —"Commencing at the front of the tenth concession, on the allowance for road between lots Nos. 18 and 19; thence along the said road allowance to the rear of the eleventh concession; thence along the allowance for road between the eleventh and twelfth concessions, westerly, to the allowance for road between lots Nos. 12 and 13; then south-easterly along the front of the tenth concession to the town line between Chatham and Dover; and from thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons, in the front of the said township of Chatham."

And it was enacted that the school section which was thus described should be designated and numbered as separate school section No. 1 for coloured people.

The by-law then proceeded to enact that the following portions as thereinbefore described should constitute and form a separate school section for coloured people, to be designated "separate school section No. 2," describing it as follows—"Commencing at the allowance for road between lots 18 and 19, at the front of the twelfth concession; then north-westerly along the said road allowance to the town line between Chatham and the Gore of Camden; and from thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons, in that part of the said township and North Gore of Chatham, not included in the separate school section No. 1, as described in the first section of this by-law."

It was provided in the by-law that the town clerk should make out a plan, shewing the boundaries of each of the separate school sections, as required by the supplementary school act of 1853, and furnish to the proper parties in each of the said sections a written statement of the boundaries of the said sections.

Prince shewed cause, and cited Con sol. Stats. U. C., cap. 65, sec. 1.

Robinson, C. J., delivered the judgment of the court.

The township council seem to have intended by the by-law to make these two school sections include all the coloured people who might for the time being be found living within their respective limits, and so to make the limits expand or contract from time to time, according as any coloured person or persons should come to live within, or should depart from, the territory which they meant these limits to include.

We are not sure whether such an arrangement of the limits might not be found capable of being reconciled with the various provisions of the school law which are liable to be affected by it.

No particular evil or inconvenience was complained of in the argument as having arisen from the by-law, though it was passed so long ago as 1854; but if it be on the face of it clearly illegal, we apprehend we have hardly a discretion to allow it to stand, and at any rate the sooner the separate schools are placed on a legal footing the better.

It must be allowed, however, that the language of the statute, in its 195th section, which gives the power to quash by-laws, is not compulsory; and we would guard ourselves against laying it down in positive terms that the court are bound to quash every by-law that is properly moved against and found illegal, without regard to the frivolous nature of the objection, and to the length of time it has been in operation and submitted to, and to the increased inconvenience which on that account may follow its being quashed.

These two by-laws are exceptionable in two respects: first, they do not define intelligibly and clearly the limits within which the arrangement, such as it is, is intended to operate. The fourth or last boundary in each description is defective, being so vague and indefinite that it does not complete a description of any certain tract within which the fluctuating arrangement is to prevail. "From thence" (that is, from the point arrived at as the end of the third limit) "to include all and singular, each and every parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in the front of the said township of Chatham." Those words towards the end of the description in the first by-law do not complete the description of any territory, so as to separate it from other territory, for it is not stated in what direction we are to move when we set out "from thence," whether west, east or north. The intention, we suppose, may have been that we may carry a line from thence, and proceed any where, in and out, through the front of the township, embracing every lot occupied by a coloured man. Did they mean the whole of every lot on any part of which a coloured man lives, or only the part of the lot on which he lives? and besides, what is meant by the front of the township of Chatham? Does it mean the whole of the front range of lots to No. 1 inclusive, and the rear of the lots as well as well as the front? Was the description intended to embrace the eleventh concession or only the tenth?

The same kind of defect exists in the other by-law, which was intended to define by-law No. 2, though not exactly to the same extent.

And a second exception has been urged to each by-law, that it does not *prescribe the limit of the divisions or sections of such schools*, but leaves this extent uncertain at every moment of time, by making it depend on the contingency of no coloured person having come in to occupy, or having ceased to occupy, any of the lots since the last inspection took place.

One effect of the by-law must be, we think, to exclude from a participation in the benefits of the common school system all coloured people who can, by any clear construction of the description, be brought within one or other of these sections, although they might be living at a distance altogether too remote from the school house which would best answer the convenience of the other coloured inhabitants to admit of their attendance there.

The description seems well framed for excluding all the coloured children from attending any other than separate schools, but it does not appear to be so framed as to bring all the coloured children within a practicable distance of any separate school.

The coloured people, it is recited, had petitioned for the establishment of *two separate schools* in the township of Chatham. That end would be reasonably answered by establishing two separate schools for them, each having certain limits and including a space

within which a coloured population was to be found in the greatest number.

Instead of that the by-law divides a large territory, we do not indeed see how large, into two parts, and makes each part a separate school section, which confines the coloured population within each to their own separate school, though such division may be so large that all the coloured people within it could not, on account of the distance, attend in the separate school.

This consideration, however, of the apparent inexpediency of the by-law, was one for the township council to deal with. The other objection, that the divisions are not intelligibly confined, and are based upon an arrangement fluctuating and uncertain in its nature, and which does not give to the school section any limits that can be said to be ascertained and known at any point of time,—are those on which this application turns, and we think the by-law in that respect is illegal, and must be quashed with costs.

Rule absolute.

IN THE MATTER OF JOHN MCDOUGALL AND THE CORPORATION OF THE TOWNSHIP OF LOBO.

Relief of poor—Duty of municipalities—Consol. Stats. U. C., cap. 54, sec. 276.

C., a servant living in the township of London, was travelling to Komoka with a load of trees and was injured on the way by the waggon upsetting. He was taken to the tavern of M., in the township of Lobo, where his leg was amputated, and he remained several months at M.'s expense destitute and helpless.

Held, that the court had no power to compel the corporation to provide for his relief.

J. Wilson, Q C., moved for a mandamus to the corporation of the township of Lobo, to make provision for the support of one James Campbell, an indigent labourer.

The rule was moved upon an affidavit of the applicant, McDougall, made on the 28th of August, 1861, to the following effect:—

That on the 28th of October, 1860, one James Campbell, being on his way from London to Komoka, with a load of trees, met with an accident, from his waggon having been upset, and was brought to his, McDougall's, inn, in the township of Lobo, where he was left at the time, under the impression that he would be in a condition to be removed in a few days: that within a day or two an artery in his thigh began to bleed, and at the end of a week after he came his leg was amputated, and he continued for some months in a very weak state: that he had never since been able to leave McDougall's house, and still remained in a helpless condition: that he was a stranger to McDougall when he was brought to his house, being at the time in the employment of one Haynes, a nurseryman, in the township of London, with whom he had lived about three months as a hired man, upon wages of six dollars a month: that he had before that time lived about two months in the township of Lobo, and before that time about two years in the township of Carradoc.

McDougall swore that he was unable to support the man: that he applied to the corporation of Lobo for payment, and was referred to the corporation of the county of Middlesex, and they referred him to the corporation of London, which refused to do any thing: that he had applied at every meeting of the corporation of Lobo for remuneration or assistance and had been refused: that they had dared him to turn the man away, and positively refused to allow him anything for having kept him. And he swore further that neither Campbell, nor any one for him, had paid him any thing whatever for his support, nor for any thing that he had done for him, or given him; and that Campbell was worth nothing, being absolutely indigent and helpless, and about 45 years of age.

ROBINSON, C. J., delivered the judgment of the court.

By the Municipal Act, (Consolidated Statutes of Upper Canada, cap. 54, sec 276,) it is enacted as follows: "Every township council may also make by-laws for raising money, by a rate to be assessed equally on the whole ratable property of the township, for the support of the poor resident in the township."

By the 16 Vic., cap. 181, sec. 9, sub-sec. 2, it had been provided that every township council should have power to pass by-laws for levying a rate to be assessed equally on the whole ratable property of such township, "for raising such moneys as may be considered necessary for the support of any indigent, infirm or helpless persons resident in such township." But it was in the same clause provided, that no by-law for such purpose should be made or passed, unless upon a written request to that effect, signed by a majority of the freeholders and householders on the assessment roll of the township, &c., nor unless notice of such request should be published in the manner set forth in the act.

In the existing provision we see that the legislature have dispensed with any such request of the inhabitants, and in a few words have enabled, but not required, the township council to raise money by rate for the support of the poor resident in the township.

We can have no doubt that, though the legislature have by this last act given full authority to the township council of their own motion to raise a rate for the resident poor, they have left a discretion to be exercised by them in regard to the necessity for such a rate.

The 43 Eliz., cap. 2, made it the duty of justices to provide for the relief of the poor—"shall and may make a rate," are the words which were used in it; and then it provided for overseers of the poor, who had power to call for and to administer the necessary funds. Here there is no such organization. We could never hold that it was competent to us to proceed upon the case of any individual applicant, for it does not rest with us to dictate to the municipal councils what particular cases of distress call for public relief. Even if it were evident that the poor man, Campbell, could be properly regarded as a *resident* of the township of Lobo, we could not, we think, entertain the application.

It is hard that McDougall has been allowed to bear all the charge and inconvenience of taking care of Campbell ever since he was disabled by the accident he met with; and it does seem a reproach to his neighbours, among whom there are no doubt some wealthy farmers, that they should not have voluntarily assisted him in his work of benevolence. We should have supposed that if they failed to do this the township council would, out of the public funds, relieve McDougall from the burthen, as it would be a *trifle only that would be required, though to one individual the* charge is not trifling.

We grant no rule.

Rule refused.

THE QUEEN V. PRESTON.

Assessment Roll—Forgery.

An indictment will not lie for forging or altering the assessment roll for a township deposited with the clerk.

An indictment was preferred at the spring assizes for the United Counties of Northumberland and Durham, before McLean, J., which indictment was found a true bill by the grand jury, as follows:

"*United Counties of Northumberland and Durham, to wit:*

"The jurors of our lady the Queen upon their oath present, that Porter Preston, John McGill and John Berrie, on the twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty, at the township of Manvers, in the county of Durham, falsely and fraudulently did forge and alter a certain assessment roll, being the assessment roll for the said township of Manvers, for the year of our Lord one thousand eight hundred and sixty, with intent thereby to defraud."

This indictment was removed by certiorari into this court, and R. A. Harrison, for the defendants, moved to quash the same on the following grounds: 1st. Because the same is not maintainable in law. 2nd. Because it does not disclose any offence punishable by law. 3rd. Because it is in other respects insufficient and informal.

These objections were argued in Easter Term by *R. A. Harrison* for the defendant, and *Hector Cameron* for the prosecution.

R. A. Harrison contended that this indictment could not be maintained, the alleged offence of forging and altering an assessment roll being charged against the defendants as a misdemeanor at common law, and that an assessment roll being created or directed for specific purposes by statute, could not be the subject of forgery, unless made so by the statute under which it is brought into existence, or by some other statute. He cited Consol. Stats. U.C., cap. 55, secs. 19, 49, 50; cap. 54, sec. 70, sec. 97, sub-secs.

2, 7, sec 185; Consol. Stats., C, cap. 94; cap. 99, secs. 84, 85; *Rex* v. *Wright*, 1 Burr. 543; *Anon.*, 3 Salk 25; *Rex* v *Marriott*, 4 Mod. 144; 1 Saund. 248, 250 *e*, note 3; *Rex* v. *James*, 1 Stra. 679; *Rex* v. *Carlile*, 3 B. & Al. 161, 164; Russell on Crimes, vol. 1., 50, 51; Arch. Crim. Pl. 464

Hector Cameron contended that, though not declared to be an offence by statute, yet that an assessment roll being sanctioned by statute, and the mode and object of its being constructed being pointed out by law, any false and fraudulent alteration of it must be regarded an offence at common law, and that any such alteration must come under the designation of forgery, for which an indictment will lie. He cited Russell on Crimes, vol. ii., 318, 357; *Rex* v. *Ward*, 2 Str. 747; Consol. Stats., U. C, cap. 55, sec. 173.

McLEAN, J.—By the 17th section of chapter 55, Consol. Stats, U. C., the council of every municipality, except counties, are required annually to appoint such number of assessors and collectors for the municipality as they deem necessary. By the 19th section, the assessor or assessors shall prepare an assessment roll in which, after diligent inquiry, he or they shall set down, according to the best information to be had, the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, or in the district for which such assessor or assessors has or have been respectively appointed. Various other particulars to be inserted in an assessment roll are prescribed by the sub-sections which follow. The assessors are required to make and complete their rolls in every year between the 1st of February and such day, not later than the 1st of May, as the council of the municipality appoints, and they are required to attach thereto a certificate signed by them respectively, and verified upon oath or affirmation, in a prescribed form. When the roll is thus made up and verified, the assessor has to deliver it to the clerk of the municipality, with the certificates and affidavits attached; and the clerk is then required to make up a copy of every such roll, arranged in the alphabetical order of the surnames, and cause the same to be put up in a convenient and public place, and kept there till the meeting of the court of revision. Then the assessment rolls are subject to the judgment of the court of revision, composed of a majority of the township council, the decision of which court may be brought by appeal before the judge of the county court, whose decision is in all cases final.

After the assessment roll has been finally revised and corrected, the clerk of the municipality is required (sec. 69, cap. 55) without delay to transmit to the county clerk a certified copy thereof, upon which the county council may proceed in equalising the valuations in the several municipalities.

By the 97th section of the Act relating to Municipal Institutions cap 54, Consol. Stats., U. C., when an election is to be made, the clerk of the municipality is required to deliver to the returning officer, who is to preside at the election for the same, or for any ward or division thereof, a correct copy of so much of the last revised assessment roll for the municipality, ward or electoral division, as contains the names of all male freeholders and householders rated upon the roll in respect of real property lying within the municipality, ward or electoral division, with the assessed value of the real property for which they are respectively rated, which copy is to be verified on oath as a true copy by the clerk of the municipality.

The copy of the assessment roll furnished by the clerk of the municipality to the returning officer is the authority under which the votes are taken at every municipal election; and the 185th section of the Municipal Act, cap. 54, declares that if any person steals, or unlawfully or maliciously, either by violence or stealth, takes from any deputy returning officer or poll clerk, or from any other person having the lawful custody thereof, or from its lawful place of deposit for the time being, or unlawfully or maliciously destroys, injures or obliterates, or causes to be wilfully or maliciously destroyed, injured or obliterated, or makes or causes to be made any erasure, addition of names, or interlineation of names, into or upon, or aids, counsels or assists in so stealing, taking, destroying, injuring or obliterating, or in making any erasure, addition of names or interlineation of names, into or upon any writ of election, or any indenture, poll-book, certificate or affidavit, *or any other document or paper made, prepared or drawn out according to or for the purpose of meeting the requirements of the law in regard to municipal elections*, every such offender shall be guilty of *felony*, and shall be liable to be imprisoned in the Provincial Penetentiary for any term not exceeding seven nor less than two years, or in any other place of confinement for any term less than two years, or to suffer such other fine or imprisonment, or both, as the court shall award; and it shall not be necessary to allege that the article in respect of which the offence has been committed was or is the property of any person, or that the same was or is of any value.

The first object for which an assessment roll appears to be intended by the legislature is to procure a return of the names of all taxable persons resident in each municipality who have ratable property therein, and various other purposes connected with the raising of moneys for municipal purposes.

There is no provision whatever declaring it to be an offence to add to or alter such roll in this respect, while every care appears to have been taken to have the roll made as correct in every respect as possible before it is given to the collector as his warrant to levy the rates of his municipality; but to prevent names from being inserted by or obliterated in the copy furnished by the town clerk, any such unlawful or malicious interference is declared to be felony.

It is the alteration of, or interference with, the *copy* of the assessment roll furnished by the town clerk for municipal purposes which is declared to be a felony, not of the original filed in the office of the clerk of the municipality, So that if the offence of forgery of the assessment of a municipality as delivered in by the assessors to the township clerk is not an offence at common law, this indictment cannot be maintained.

It alleges that the defendants *falsely* and *fraudulently* did forge and alter the assessment roll of the township of Manvers, for the year 1860. Now the mere statement of such a charge in an indictment, and the finding by a grand jury, is not enough to create an offence, and I do not see any law, under which the doing of what is charged in this indictment is an offence of any kind. The assessment roll of a municipality is not the roll on which the collection of rates takes place. That remains in the clerk's office, and it is his duty to make an alphabetical roll of the names, and to cause it to be exhibited in a public place for the inspection of all parties interested, and to be brought before the court of revision. When such alterations are made in the roll as the court of revision may deem necessary, and when all objections are removed or disposed of, a roll for the municipality, or for each division of it, is prepared and duly certified, for the purpose of giving to the collector the necessary authority to collect from each rate-payer the amount opposite to his name.

An assessment roll is not one of those documents which, under chapter 94 of the Consolidated Statutes, relating to forgery can be the subject of forgery, and being framed under the provisions of an act of our own legislature, and no provision made for guarding against any unauthorised changes or alterations therein, no power appears to me to be given to our courts to entertain indictments for matters which are not even declared an offence.

My opinion, therefore, is that this indictment must be quashed, and the defendant discharged.

BURNS, J., concurred.

The CHIEF JUSTICE having been absent during the argument, gave no judgment.

Per Cur.—Indictment quashed.

COMMON PLEAS.

GILDERSLEEVE v. HAMILTON.

Immediate Execution—County Courts—Power of judge of to certify for—23 Vic., ch. 42, sec. 4.

Held, that in a case pending in one of the superior courts, and taken down for trial to a county court under 23 Vic. ch. 42 sec. 4, the judge of the court below has power to order immediate execution to issue.

(E. T., 24 Vic.)

This was an action pending in this court and taken down to trial at the county court of Frontenac, Lennox, and Addington,

under sec. 4, of ch. 42, 23 Vic. On application of the plaintiff, the learned judge certified for immediate execution, and judgment was entered accordingly and *fi. fa.* issued

W. H. Burns, for defendant, moved to set aside the judgment and execution, on the ground that the judge below had no power to grant any such certificate—that the statute authorising such trial before him provided that judgment might be entered on the fifth day after the verdict was rendered, unless the judge should certify that the case should stand for motion in the court in which it was brought, in which case no judgment should be entered until the fifth day of the term.

Kingsmill shewed cause.

HAGARTY, J.—Sec. 239 of the Common Law Procedure Act, declares that "the judge before whom any issue joined in any such action, or before whom damages are assessed, may certify under his hand at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith," &c.

The county court judge who tried this case under the act of 1860, is certainly in terms within the words just before cited, as the judge before whom the issue is tried or damages assessed, and unless there be something in the act of 1860 to the contrary, I can see no ground for doubting his power.

The defendant's argument rests chiefly on the direction that judgment may be entered on the fifth day after verdict rendered, and that this provision necessarily excludes the idea that the judge had the power to certify for earlier execution.

A much more formidable difficulty was surmounted by our Court of Queen's Bench in *Paterson* v. *Hall*, 11 U. C. Q. B. 358, when the county court judge exercised a similar power on a writ of trial under 8 Vic, ch. 13, sec. 51, although it was directed by sec. 53, that at the expiration of six days from filing the writ of trial in the Crown office, judgment might be signed and execution issued: the court held that notwithstanding these provisions the county court judge had such power on a fair construction of the 16 Vic., ch. 175, sec. 27, which declares that in all actions in superior courts or county courts, the judge may so certify.

The same view was taken by the Court of Common Pleas in *McKay* v. *Hall*, 4 U. C. C. P. 145, and the judgment of *Macaulay*, C. J., is express on the point.

If these cases were rightly decided, which I see no reason to doubt, the power to certify in the case before us, is, I think, clear.

Rule discharged.

DRAPER, C. J., took no part in this judgment.

POWELL v. BANK OF UPPER CANADA.

Chattel mortgage—Description of goods covered thereby—Statute 20 Vic. ch 3, sec. 4

The property covered by a chattel mortgage was described as "The goods, chattels, furniture, and household stuff expressed in the schedule *hereunto* annexed," which schedule was headed, "An inventory of goods and chattels in the possession of one J. R." *on* a certain day. It proceeded to mention certain rooms and the articles therein contained—then jewellery, blankets, household linen, silver, &c. &c.—the locality of the house in which the goods, &c., were contained not being mentioned.

Held, a *sufficient description* of the goods and chattels intended to be covered by the mortgage under the authority of previously decided cases referred to in the judgment of the court.

[E. T., 24 Vic.]

Interpleader issue to try whether certain goods seized on the 29th November, 1860, by the sheriff of York and Peel under a *fi. fa.* issued by the defendants against one John Ridout, were the property of the plaintiff as against the defendants.

The issue was tried at Niagara, in May, 1861, before *Richards*, J. The only point taken at the trial was whether certain goods and chattels were sufficiently described in a chattel mortgage made by the execution debtor to the plaintiff. The chattel mortgage purported to grant, bargain, sell, and assign, the goods, chattels, furniture, and household stuff expressed in the schedule thereto annexed. The schedule was headed inventory of goods and chattels in the possession of John Ridout, 7th July, 1860, referred to in the bill of sale by way of mortgage. It proceeded thus—"Drawing-room," and then followed a list of articles. Next "dining-room," and a like list, and so on, naming various rooms, and giving a list of furniture and articles in each. Then came "jewellery, 1 set pearl, 3 gold chains, 10 jewelled rings, 1 pair gold hairpins, 10 bracelets, gold, agate, and jet; 8 bracelets, do. do.; 3 gold lockets, 1 silver buckle, 1 blue opaque set, 1 gold pencil, 1 pair gold cuff pins, 2 gold seals, 1 bunch gold charms, 2 silver pencils, 1 pair of silver tweesers, 1 gold and two silver watches." Then came a list of blankets and counterpanes and of household linen, and then "silver—18 dinner forks, 1 child's spoon and fork, 6 table spoons, 18 tea do., sugar tongs, mustard and cayenne spoons, soup ladle, child's cup, and 4 salt spoons." Other articles were similarly enumerated.

The defendants' counsel contended that of these articles of jewellery, blankets, and counterpanes, silver, &c., there was no sufficient description. They were not mentioned to be in any of the rooms, nor was any specific description of them given.

Leave was reserved to defendants to move to enter a verdict as to these articles; and on other questions connected with the *bona fides*, and legal sufficiency of the transaction, the plaintiff had a verdict.

In Easter Term *W. Eccles* obtained a rule *nisi*, to enter a verdict for defendant, as to these articles which were not described as being in any room or place, on the ground that such articles were not sufficiently and fully described as required by the statute in that behalf, the said goods being under the heads of jewellery, blankets, and counterpanes, household linen, silver, electro and plated ware, cutlery, china, glass, earthenware, library [which was thus set forth in the schedule, "Library—133 volumes of standard literature, 211 vols. miscellaneous novels, magazines, &c., 53 English school books, 16 Latin do., 14 Greek do., 21 French, 7 Italian and 6 German do., 7 bibles, 4 prayer books."] The rule was also in the alternative for a new trial on the same ground.

Hurd shewed cause; he argued that the description was as particular as the nature of the articles admitted; that such things as jewellery, silver plated goods, &c., had no *habitat*. They were moved and carried about as convenience and the necessity for using them dictated—now here, now there. To describe such things as in any particular room or place, would be either to mislead or to lay the foundation for an objection to the truth of the description, as they might not be found in such place at any particular time. That the word "library" might mean the room in which books were kept, as well as the collection of books.

W. Eccles repeated his objection to the generality of the description as not complying with the statute.

No cases were referred to on either side.

DRAPER, C. J.—In almost every case that arises under the chattel mortgage registration act, Consol. Stat. U. C., ch. 45, where the proper construction of the sixth section is in question, we find difficulties and doubts which might have been obviated, or materially diminished, if somewhat more pains and consideration had been applied to the framing the instrument.

In the present case, a direct statement, that the goods, furniture, &c, in the dwelling house of the assignor, or in any other named house, is omitted. And excepting that the assignor is described as "of the City of Toronto," the locality of the apartments in which a very considerable part of the furniture, &c., are specified in the schedule, to be, is left undefined. Printed forms seem to be hastily filled up, and a litigation both protracted and expensive is the frequent result.

The section in question is very short. "All the instruments mentioned in this act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished."

In one of the first cases, in which it was considered, *Robinson*, C. J., said, "I do not find it easy to understand how a stock of goods in a shop, or furniture in a dwelling house, are to be otherwise described than by stating the shop, warehouse, or dwelling in which the goods or furniture respectively are at the time of the assignment," unless by taking a minute list of every article, and the court there held that goods not particularly described by locality or otherwise, would not pass under the words "all other personal estate whatsoever and wheresoever. *Harris* v. *Commercial Bank*, 16 U. C. Q. B. 437.

In *Wilson* v. *Kerr*, 17 U. C. Q. B. 168, the description was "all and singular the stock in trade" of the assignor, "situate on

Ontario street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle." The court held this an insufficient description, and the decision was affirmed in the Court of Appeal, 18 U. C. Q. B. 470, where it was held that there being no list or schedule of the stock in trade, the premises, wherein it was to be found, should be designated with greater certainty, and as to the "other goods," there was no description whatever of them, except that they were "*his*," the assignor's.

Kingston v. *Chapman*, 9 U. C. C. P. 120, was rather negative than affirmative on the question, the court refusing to pronounce that "under all circumstances, the merely describing chattels as those which were in a named building, was an efficient and full description."

Fraser v. *The Bank of Toronto*, 19 U. C. Q. B. 381, comes nearer to the present case. The assignment was of all the goods, chattels, and household stuff, particularly mentioned and set forth in the schedules B. C. and D. annexed to the mortgage. Schedule C. was headed "household furniture in Exter Walsh's residence." Schedule D. was headed "household furniture and property of J. R. McDermot," but the articles enumerated in these schedules were not described in any manner that could enable a person to distinguish them from other articles of the same kind, though they were specified as so many chairs, a piano, a sofa, &c. As in this case the locality of the house was not specified. No house was directly mentioned, but the furniture was described as in the residence of Exter Walsh, and the court held that the use of the words "household furniture" as to McDermot, warranted the assumption that the schedule referred to his dwelling house, as it referred to and specified the several apartments in which such furniture was.

In our case no objection is taken as to any of the furniture, &c., scheduled as being in a particular apartment, and the case of *Fraser* v. *The Bank of Toronto*, seems to warrant our holding that as the goods, &c., are described in the deed as the goods and chattels, furniture and household stuff, "expsessed in the schedule hereunto annexed," whatever is specified in the schedules, and can be properly deemed to come within the definition of furniture and household stuff, will pass to the plaintiff.

As to the books, we may treat the word "library," as descriptive either of the collection of books, or of the apartment in which they are contained. In Johnson's dictionary the former definition is alone given. In later authorities, among them the imperial dictionary, both senses are given to the word, and it is, I think, at the present day commonly used and understood in both senses.

Then as appears to me "blankets and counterpanes," "household linen," "silver," "electro and plated ware," "cutlery," "china," "glass," and "earthenware," as heads, under each of which are detailed articles of the several descriptions, may be properly treated as coming within the general terms, "furniture and household stuff," used in the deed of assignment, all of them being described in the schedule as in the possession of the execution debtor.

There remains the things specified under the general head "jewellery." There is a list, with a descriptive statement of material or of the nature of the article or of the object for which it is designed, conceived in general terms, and yet particular enough to facilitate identification. I cannot say the description would enable a stranger positively and certainly to identify each article, but nevertheless coupled with the allegation that they were the property of the execution debtor, and were in his possession, and have been levied upon in his possession under the *fi fa.*, I am not prepared to hold it an inefficient description, so as to make the assignment as to those things of no effect. Some weight is due to the finding of the jury that the assignment was made in good faith and upon sufficient consideration.

On the whole, I am of opinion that the rule must be discharged.

RICHARDS, J.—I only concur in this judgment as carrying out the views of the Court of Queen's Bench in the case referred to, conceiving it better to follow the principles laid down in that decision, than to dissent from them until the question is settled in appeal.

HAGARTY, J.—If this case were the first case under the statute I should at once decide that the jewellery at all events, if not the rest of the chattels, were insufficiently described; but after the decisions that have taken place, I agree with the learned Chief Justice that we can hardly hold the present description insufficient. I cannot see how we can hold it to be less in accordance with the statute than that of the "household furniture," in *Fraser* v. *Bank of Toronto*.

I decide in the plaintiff's favour wholly on the decided cases, not from my own reading of the statute.

Per cur.—Rule discharged.

CORBETT v. JOHNSTON ET AL.

Replevin—Taxes—Distress—Legal as to part.

A collector having legal authority (the tax roll) for the collection of three sums being the rates for three specific years due for taxes, distrains by his bailiff for the amount of them with other sums not properly collectable. Upon replevin, *held*, that the three legal distresses were separable from the illegal ones, and until the sums due on them were paid replevin would not lie, and that the defendants were entitled to the *postea*.

Held, also, that a collector is responsible for the acts of *his* bailiff holding legal authority (by warrant) from him so to act, and that *an* action will lie against them jointly.

(E. T., 24 Vic.)

Declaration for goods and chattels and all the household furniture of plaintiff in his house on Queen street, Kingston.

Plea, by (Consolidated Statutes for Upper Canada, ch. 126, secs. 11 and 20, public act passed in the 22nd year of her Majesty's reign,) that defendants did not take and unjustly detain the said goods, chattels and personal property in the declaration mentioned in manner and form as in the said declaration is alleged.

At the spring assizes, 1861, at Kingston, a verdict was taken for the defendants subject to the following special case:

This action was brought in respect of a distress of the plaintiff's goods, chattels, and personal property, namely, eight horses, one table, one clock, one buggy, one carriage, and all the household furniture of the plaintiff taken under the warrant produced, filed and marked A., of which the following is a copy:

1854.	432.	C. Miller, $25·00.	1858	$402 34
1854.	430.	E. Williams 40 00.	Interest on same	80·00
		$65 00.		
	A.	1859. Balance.....		137·13
		1860 Self & tenant.		340·60
		1851. See tenants.....		65 00
				$1025·07
				137·13
				887·84

Balance 1859, $137·13, paid 15th Dec. 1860.

(Signed,) ALEX. BOWLES.

"City of Kingston. Tax warrant for 1860, and other years.

"To *Alexander Bowles*, Bailiff.

"You are hereby authorised and required to distrain the goods, chattels, and effects of Thomas A. Corbett, which you shall find upon the premises of the said Thomas A. Corbett or elsewhere in the city of Kingston, for the sum of one thousand and twenty-five dollars seven cents, (see memorandum,) rated against him and now in arrear and unpaid and in default of payment of such rate or rates, and the lawful costs and expenses of the said distress to sell and dispose of the said distress according to law for the recovery of the said rate or rates, together with the said costs and expenses according to law, and for your so doing this shall be your sufficient warrant.

"Given under my hand and seal at the city of Kingston aforesaid, this thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty.

(Signed,) "CHAS. JOHNSTON,
"*Collector.*"

The plaintiff admitted the collector's rolls for the municipality for the years 1852, 1858, 1859 and 1860, and that the extracts of said rolls put in, filed and marked, C. D. E. and F., were true extracts thereof.

The plaintiff admitted that at the time of the levy the defendant Johnston had in his possession the collector's rolls of the said municipality for the said years 1852, 1858, 1859 and 1860.

The plaintiff admitted a separate demand from him by the defendant Johnston, say in October, 1860 of each of the sums of $402 34, $137·13 and $340 60, and fourteen days before distress, and that the first sum was composed of arrears of taxes for 1852 and 185 , that the second sum was arrears for 1859, and that the third sum was taxes for 1860 as per extracts of said rolls and said note.

The plaintiff admitted that at the time of the distress, the defendant Johnston was collector of the municipality of the city of Kingston, and said defendant Bowles his bailiff, and that defendant Johnston had been such collector for the years 1858, 1859 and 1860

The plaintiff further admitted that at the time of the taking, the said goods, &c , were in the possession of the plaintiff in the city of Kingston, and that the plaintiff was a resident of the said city during the years 1852, 1858, 1859 and 1860.

The defendants admitted the taking under the warrant produced of the goods, chattels and personal property in the declaration described, and justified as for a distress for the sums of $402·34, $137 13, and $340 60. And the defendants further admitted the payment by the plaintiff after such taking and before action brought of the sum of $137·13, being the arrears for 1859; and the plaintiff admitted that no tender or payment except the said sum of $137·13 was ever made by the plaintiff on account of the said taxes $402 34, $137·13, and $340 60.

The defendants admitted the receipt of J. H. Stephens, a former collector of the city of Kingston for £11 5s., arrears of taxes for 1854, and as to this the defendants did not justify, neither did the defendants justify as to the $80·00 of interest.

If the court were of opinion that on the above case the action could be maintained the present verdict for the defendants to be set aside and a verdict for $4 to be entered for the plaintiff, and if the court were of opinion that the defendants were entitled to prevail, the present verdict to stand.

The case was argued by *Richards, Q. C*, for plaintiff. He argued that the action was properly brought and maintainable because the corporation was not responsible for the collector's acts, that on this warrant the amounts are not distinguishable, and there is no authority to take any sum less than the whole. He cited *Gov. of Bristol &c*, v. *Wait*, 1 A. & E, 264; *Sibbald* v. *Roderick*, 11 A &. E., 38; *Clark* v. *Woods*, 2 Ex., 395; *Skingley* v. *Surridge*, 11 M. & W, 503.

D. B. Read, Q. C., for defendants, contended that the whole distress was illegal because it was partly so, and therefore replevin would not lie; that the action should have been brought for excessive distress. He argued that replevin could not be maintained against the collector. That the warrant containing some illegal items rendered the whole void. He referred to *Gov of Bristol, &c.*, v. *Wait*, 1 A. & E., 264; *Millward* v. *Coffin*, 2 Wm. B., 1332; *Skingley* v. *Surridge*, 11 M. & W., 503; *Allen* v. *Sharp*, 2 Ex., 352; *Cortis* v. *Kent Water Works Co.*, 7 B. & C. 314; *Spry* v. *McKenzie*, 18 U. C., Q. B., 161; *Municipality of London* v. *G. W. R. Co.*, 17 U. C., Q B., 262; *Newberry* v. *Stephens*, 16 U. C., Q. B., 65; *Patchet* v *Bancroft*, 7 T. R., 367; *Mellor* v. *Leather*, 1 E. & B, 619; *Sturch* v. *Clarke*, 4 B. & Ad., 113.

DRAPER, C. J.—It is a part of the case that the defendant Johnston was at the time of the distress, and had been for the years 1858, 1859, and 1860, collector of taxes for the city of Kingston, and that the defendant Bowles was his bailiff, acting under the warrant set out. That Johnston as such collector in October 1860, demanded the three several sums of $402 34, (which is composed of arrears of taxes for 1852 and 1858,) of $137·13, which consisted of arrears of taxes for 1859, and of $340·60, which was the amount of taxes for 1860. Johnston at the time of making the levy had in his possession as city collector the tax rolls for 1852, 1858, 1859 and 1860.

The warrant given by Johnston to the defendant Bowles commanded him to distrain for $1027 07, and the three sums so previously demanded by the collector amounted only to $880·07 The difference between the three sums ($145) was composed, 1st, of taxes due by plaintiff for 1854, the roll for which year was not so far as we see in Johnston's possession, nor is any proof afforded that the plaintiff was liable for $65 taxes for that year as mentioned in the memorandum on the face of the warrant. 2nd, of a sum of $80, charged as interest upon the sum of $402 34.

Treating the levy by the bailiff in the same light as if the collector had been actually present doing the act himself, the case amounts to this, the collector had authority under three tax rolls, to demand, and in the event of non-payment within a limited time to distrain for three several sums. He made a proper demand; payment was not made, and after waiting as long as the law required he distrained for these three sums, and also for two other sums which he had no lawful authority to collect. The question is, whether taking the form of the warrant in connexion with the other facts—his distraining for too much avoided the whole, so that the plaintiff can replevy his goods and relieve them from the lawful demand, because another demand not lawful has been combined with it.

The cases of *Hurrell* v. *Wink*, (8 Taunt., 369,) *Millward* v. *Caffin*, (2 W. Bl., 1332,) and *Sibbald* v. *Roderick*, (11 A. & E., 38,) establish a distinction between distresses for rent and distresses for rates or other cases under statutory authority, and decide that if rates which are properly and formally charged and imposed, are joined in the same warrant with others irregularly imposed, and therefore not recoverable, and the amount of both is blended into one sum, a warrant is not sustainable for any part. *Clark* v. *Woods*, (2 Exch., 395,) to some extent, rests on a similar foundation. In that case in which a warrant had issed to arrest for non-payment of two sums and as to one the warrant was wrong, *Alderson*, B , suggested that perhaps one warrant would have been sufficient, if it had observed the proper distinction as to each sum. And so by analogy, possibly if this warrant had directed the bailiff to distrain for several sums the amount of the several rates, the warrant might have been upheld for the sums really due.

There is a difference however to be noted between those cases and the present. A warrant issued by one or more justices of the peace was necessary in each of them to authorize a distress or an arrest, and before the justices could properly act, certain information ought to have been laid before them. But under our assessment law (Consolidated Statute, U. C., ch. 55, sec. 93, *et seq.*) the collector, after calling on the person taxed and demanding payment, has authority, in case of refusal or neglect to pay, to levy the sum mentioned in the roll as payable by such person, by distress and sale of his goods, without any other intermediate proceedings. In effect, the statute makes the roll after demand and refusal equivalent to a warrant to levy.

Then as to the three sums of $402·34, $137·13, and $340·60, the collector had a separate roll, equivalent after demand and refusal, which are shewn, to a separate warrant for each. Had he gone in person to distrain I do not apprehend he need have carried the rolls with him. It would have been enough that he should have distrained for the three sums, one on each roll. If he distrained at the same time for other sums not authorized by law, no case goes the length of deciding that the distress would have been invalid. It must have been deemed severable or the goods would be considered *in custodia legis* under the first lawful seizure, and subject to the other lawful claims, and the plaintiff if he desired to relieve his goods, must have paid or tendered the three sums, and then he might have resisted payment of the residue and replevied his goods.

The warrant in this case, though necessary to enable Bowles to act for the collector, was not necessary to authorize a distress being made, and it is not therefore like those in the cases cited, without which the parties making the distress, &c., would have been mere trespassers. Moreover, on the face of it, was the very information which the collector himself would have given, if with no warrant, but three tax rolls, he had distrained the plaintiff's goods—information sufficient to enable the plaintiff to know what he was legally liable to pay.

In *Hurrell* v. *Wink*, the court says "the party rated was entitled to a precise demand of the sum actually due for the poor rate previously to the issuing of the warrant of distress." And as no such demand appeared to have been made, they held the plaintiff entitled to recover.

Here the three sums actually due were legally demanded, and in this respect the case is distinguishable, and in *Sibbald* v. *Roderick*, there was no distinction between the sums justly claimable and those not so, and no proof appears that a several demand for the different rates had been made.

Then, as to these three sums, the collector is to be treated as if acting under three separate warrants, his distraining without authority for other sums cannot vitiate the whole distress founded on the tax rolls. As each of them stood on an independent and unimpeached basis, the plaintiff cannot relieve his goods without satisfying them.

It has not been suggested on the part of the defence, that as to the rates comprised within the three sums specified, there was any want of legal authority to levy them by distress. The objection is to the other part of the demand, and the blending the whole into one sum.

I have no doubt replevin lies against the collector in this case as well as against the bailiff employed by him. In *Fraser* v. *Page*, 18 U. C. Q. B., 346, Sir J. B. Robinson, C. J., said, "of course the collector would be liable for anything done which he had authorized the bailiff to do." Here the authority was expressly given, and has been executed accordingly.

On the whole I am of opinion this case is distinguishable from the authorities cited, and that the *postea* should be delivered to the defendants. I assume three legal rates in force, and three separate tax rolls each to collect one of them. For so much I hold the distress valid, and as a consequence that the plaintiff could not replevy while those rates were unpaid.

Per cur.—*Postea* to defendants.

Dunne v. O'Reilly.

Attorney and Clerk—Agreement for proportion of profits—Validity thereof—Statute 22 Geo. II., cap. 46.

The Imperial Statute 22 Geo. II., cap. 46, among other things making regulations in respect to attorneys and solicitors is in force in Upper Canada.

Where plaintiff, an English barrister, was articled to defendant' an attorney, upon an understanding that plaintiff was to become a partner with defendant after being sworn in as an attorney, and, in the meantime, was to receive one-fourth of the profits of all business taken in the office from the time he became defendant's clerk, the agreement was held to be contrary to the provisions of 22 Geo. II., cap. 46, and void.

(T. T., 25 Vic.)

This was an action in the Common Courts. The pleas were, 1st. Never indebted; 2nd. Payment; 3rd. Set off.

At the trial at the Hamilton Assizes, on March, 1861, before Richards, J., it appeared that the plaintiff having been a member of the bar in the Mother Country, was admitted as a barrister in Upper Canada. The plaintiff was articled to the defendant, an attorney, and, as was admitted at the trial, upon an understanding that he was to become a partner with defendant after being sworn in as an attorney, and was to receive one-fourth of the profits of all business taken in the office from the time he became defendant's clerk. His articles of clerkship expired about the 17th March. He left the defendant's office, but with defendant's consent, in consequence of disagreement between the parties, about the end of June or beginning of July following.

Evidence was given to shew what defendant's business was worth, and evidence to shew that the plaintiff was not very well skilled, in common law practice. It did not appear when plaintiff was admitted as an attorney.

It was objected that notwithstanding this agreement, the plaintiff had no right to any remuneration during the time that he was a clerk under articles.

The learned judge held that if the agreement was as stated, the plaintiff would have a right to recover something according to the value of his services.

The defendant then opened evidence as to his set off, upon which the learned judge referred the taking the accounts to an arbitrator, and left it to the jury to say what amount of compensation the plaintiff was entitled to, according to the arrangement.

The first entry in the defendant's books made by plaintiff, was dated 18th October, 1858, and the last, the 27th May, 1859.

The jury found for plaintiff—damages £200, the question of set off being referred to an arbitrator.

In Easter Term *Eccles, Q. C*, obtained a rule for a new trial for misdirection—1st. In holding that the plaintiff was entitled to recover for his services under a *quantum meruit*, for the agreement was that plaintiff should become a partner, and he had voluntarily abandoned it, and therefore could not recover anything under it. 2nd. In ruling that plaintiff was entitled to recover for services during the time he was an articled clerk to the defendant.

M. C. Cameron shewed cause, citing *Keys* v. *Harwood*, 1 C. B. 905; *Emmens* v. *Elderton*, 18 Jur 21.

R. A. Harrison on the same side, referred to *Phillips* v. *Jones*, 1 A. & E. 334; *Bryant* v. *Flight*, 5 M. & W. 114.

Eccles, Q. C., said the cases cited did dot apply, as they were cases of wrongful dismissal. That the evidence shewed the arrangement was put an end to by mutual consent. The contract was, that on a given event he should be admitted as a partner, and should have a fixed proportion of the profits of the business. He never became a partner, and agreed with the defendant to put an end to the arrangement, consequently he had no right to recover. He cited *Whyatt* v. *Marsh*, 4 U. C. Q. B. 485; *Parnell* v. *Martin*, 5 U. C. C P. 473; *Taylor* v. *Brewer*, 1 M. & S. 290.

Draper, C. J.—The understanding between the plaintiff and defendant as admitted by both sides at the trial, and which formed the basis of the plaintiff's demand, was this as I gather from the evidence:—that the defendant being a practising attorney, took the plaintiff as an articled clerk, and it was agreed that as soon as the plaintiff had completed his service and had been admitted to practise as an attorney, he should be taken into partnership with the defendant, and should receive one-fourth of the profits of defendant's business, to be computed from the commencement of plaintiff's service under the articles to defendant. But two or three months after the expiration of the service, the parties having disagreed, parted by mutual consent. The articles expired in the vacation, the plaintiff and defendant finally separated some weeks after the first day of the following term, but it did not appear whether plaintiff was at that time, or since, admitted to practise as an attorney.

So far as is shewn, all parties seem to have overlooked the Stat. 22 Geo. II., ch. 46, which, together with the enactments respecting exactions of the occupiers of locks and weirs upon the Thames, for regulating the assize of bread, for preventing the distemper spreading among horned cattle, makes regulations in respect to attorneys and solicitors.

This act, though repealed in England by 6 & 7 Vic., ch. 73, continues in force in this province.

In the case of *Tench* v. *Roberts*, Mad. & Gel., or 6 Mad. 146 n., it seems to have been considered that an attorney who forms a partnership with an unqualified person came within the act, and also that an unqualified person assisting in the business and sharing in the profits was to be considered as a partner, as the necessary result was to enable him to practise as an attorney for his own profit. *In re. Jackson* v. *Wood*, 1 B. & C 270, is also a very strong case to shew how the Court of Queen's Bench view such a proceeding. I may also refer to *Ex parte Whatton*, 5 B. & A. 824; *In re. Clarke*, 3 D. & R 260; *In re. Isaacson*, 8 Moore, 214, 322; *In re. Garbutt*, 2 Bing. 74; *Sterry* v. *Clifton*, 9 C. B. 110.

The case of *Williams* v. *Jones*, 5 B. & C. 108, is, I apprehend, in principle fatal to the plaintiff's claim for services while such an agreement existed, at least during such time as elapsed before he was admitted as an attorney. *Scott* v. *Miller*, 5 Jur. *N. S.* 838, shews the law is the same under the 6 & 7 Vic., though the facts did not sustain a charge of violating its provisions.

This objection to the plaintiff's recovery was not taken at the trial or on the argument Whether advisedly foregone or no, the Court can neither overlook nor permit an arrangement so plainly contrary to the policy of the Statute regulating attornies to be treated as binding, or as capable of furnishing a substratum for an implied promise to pay for services actually rendered in part performance of it.

Whether anything that took place after the plaintiff was admitted an attorney can uphold a claim against the defendant, we are not called upon to enquire.

The rule must be made absolute without costs.

Richards, J., and Hagarty, J., concurred.

Per Cur.—Rule absolute without costs

CHANCERY.

Reported by THOMAS HODGINS, Esq., L.L.B., *Barrister-at-law.*

BUCKLEY v. RYAN.

Act abolishing registration of judgments, 24 Vic cap 41—construction of s 11—Retrospective effect.

The words "suit" or "action" in stat. 24 Vic, cap 41, sec 11, mean suit or action to which a judgment creditor is a party, not the original action or suit in which the judgment is recovered.

Therefore, *held*, where plaintiff recovered a judgment on 5th June, 1856, registered it on the following day, defendant being then the owner of certain land in fee, which land the judgment debtor subsequently conveyed to defendant, that as there was no suit pending on the 18th May, 1861, when stat. 24 Vic. cap 41, came into force in respect of the judgment or the land affected by it, in which plaintiff was a party, a bill by plaintiff, seeking to charge the land was not sustainable.

SPRAGGE, V. C.—The bill sets out a judgment recovered by the plaintiff against Ryan, on the 5th June, 1856, and registered on the sixth of the same month; that Ryan was at the time the owner in fee of a certain parcel of land described in the bill, and that the judgment was re-registered on the 8th April, 1859; that Ryan on the 4th July, 1856, conveyed the said parcel of land to defendants Wilson and Drewry, and that the conveyance to them was registered on the 31st of same month.

The bill was filed on the 24th July, 1861, and the question arises under the Act of last session (24 Vic. cap 41,) repealing the law relating to the registration of judgments in Upper Canada.

If the Act had closed with the 10th section, I apprehend the effect would have been that lands would upon the passing of the Act have ceased to be affected by the registration of judgments except in the language of Lord Tenterdon in *Surtees* v. *Ellison*, 9 B. & C, 752, in "transactions passed and closed," and to sustain suits thereupon, which in the language of Tindal, C. J., in *Kay* v. *Goodwin*, 6 Bing. 576, "and commenced, prosecuted, and closed, whilst it was an existing law."

The 11th section qualifies the general effect of the repeal of the pre-existing law, and saves from its application all suits and actions pending on the 18th May, 1861, (the day of the passing of the Act,) in which any judgment creditor was a party.

The plaintiff reads these words as applying to the original suit in which the judgment was recovered and registered, but to that suit no judgment creditor was a party in the sense in which the words are obviously used in the statute. The plain meaning is—a party *as* a judgment creditor. If it had been meant to apply to the original suit the ordinary proper words to have been used would have been "any action in which judgment has been recovered." The use of the word "suit" also seems to negative its application to the original action at law, and to show that what was meant was any action at law or suit in equity in which a judgment creditor as such was made a party.

I think, therefore, that there being no suit pending on the 18th May, 1861, in respect of this judgment, or the lands affected by it in which the plaintiff was a party, the bill is not sustainable.

Per Cur.—Bill dismissed.

CHAMBERS.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

NOELL ET AL. v. PELL.

Assignment of chattels for benefit of creditors—Consideration—Description of goods—Affidavit of bona fides before whom to be sworn—Addition of assignee.

The Consol Stat. U. C., cap. 45, respecting mortgages and sales of personal property, does not require a money consideration.

An assignment for the general benefit of creditors, as far as the effects will go in the discharge of the assignor's liability to them, together with the acceptance of the trust by the assignees, who swear they are creditors, is a sufficient consideration to support the assignment.

An assignment of "all the stock in trade, merchandise, goods and effects," in the "shop occupied by the assignor, situate on the south side of King street, in the city of Toronto, and known and numbered 77, which said goods and chattels are particularly mentioned in the schedule annexed hereto and marked A;" which schedule begins "stock in workshops," and goes on describing what is therein; and next describes what is in the front store.

Held sufficient to pass not only what was contained in the front shop first described, but what was contained in a continuous shop consisting of the front store and two workshops.

"14,415 feet of prepared moulding"—*held* a sufficient and full description under the statute.

It is no objection to the affidavit of bona fides that it is sworn before a commissioner who was the gentleman that prepared the assignment.

"Secretary of the Board of Arts and Manufactures"—*held* a sufficient addition under the statute.

[Chambers, November 13, 1861.]

This was a summons issued on application of the Sheriff of York and Peel, calling on William Edwards and John Sterling as claimants, and on the plaintiffs, to appear and show cause why they should state the nature and particulars of their respective claims to the goods seized by the Sheriff, under a *fi. fa.* in this cause.

The parties appeared on the 9th November, 1861, and called upon Draper, C. J., on the consent of the plaintiff and the claimants, to dispose of the merits of the claim and to determine the same in a summary manner, under Consol. Stat. U. C., ch. 30, ss. 3 & 8.

The facts sufficiently appear in the judgment of the learned Judge.

DRAPER, C. J.—The claimants set up a deed dated 17th Sept. 1861, between defendant of the first part and William Edwards, Secretary of the Board of Arts and Manufactures, and John Sterling, of the same place, boot and shoe maker, of the second part, which witnessed, that for the purpose of satisfying his creditors as far as his estate and assets would enable him to do so equally, share and share alike, defendant assigned to the claimants "all the stock in trade, merchandise, goods and effects, now contained in the shop occupied by the said party of the first part, situate on the south side of King street, in the city of Toronto, and known as and numbered 77 King street west, and which said goods and chattels are particularly mentioned in the schedule annexed hereto and marked A;" also some goods in Hamilton not in question on this application, "and all his household furniture specified in the schedule hereunto annexed, marked C, contained in the house occupied by him, numbered 77 on King street west, in the said city of Toronto:" to hold upon the trusts following: 1st. To sell the same in such manner as they shall think proper, for the benefit of the creditors. 2nd. Out of the proceeds to pay the costs and expenses of the assignment and the carrying out the trusts. 3rd. To pay the residue to the creditors, in equal proportions, share and share alike, so far as the same may extend in payment and discharge of their respective claims, without preference or priority to any of them. Power was given to the assignee to compromise with any debtor of the defendant, or with any of the creditors, "so as the other creditors of the said party of the first part (the defendant) shall not be prejudiced"

In the affidavit of William Edwards, one of the assignees, he is described in the deed by way of addition, as "Secretary to the Board of Arts and Manufactures."

In the schedule A, one part of the stock was headed "stock in workshop," and then followed the description and value, commencing, "14,415 feet of prepared moulding, $494 84." Then another part is headed "front store west side," another "west window," another "east window."

According to a plan of No. 77, it seems the dwelling house is above the front shop, directly behind which is a "workshop," separated from the front shop partly by a brick wall, and the centre, being half the whole width, by a temporary board partition through which is a door, and behind this again is a joiner's shop, being another workshop, over this is a gilding shop. The two workshops are separated by a brick wall, through which there is a door.

A paper purporting to be signed by three creditors of defendant assenting to the assignment was put in, but there was no proof that it was executed, or that the parties whose names were thereto were creditors of defendant. The assignees made an affidavit that they were creditors of the defendant, the first to the amount of £25, the other to the amount of £3 4s. 4d.

This was the claimant's case.

For the execution creditors it was objected—1st. That no consideration appears for making an assignment, nor does it appear that the assignees, or either of them, were creditors.

The statute does not require a money consideration; and the payment of creditors as far as the effects will go in discharge of the defendant's liability to them, together with the acceptance of

the trust by the assignees, who swear they are creditors, is, in my opinion, a sufficient consideration to support the assignment.

2nd. No proper conveyance appears thereby, nor does it appear that anything was conveyed.

It is sufficient to read the deed to answer this objection. It states that defendant hath assigned and "now doth assign" all, &c.

3rd. That it is not shewn whose property is conveyed.

This objection is extremely hypercritical, as a perusal of the whole instrument will show. Unless the property conveyed by the deed be defendants, what right have the execution creditors to seize it. The identity of the property seized with that claimed under the assignment is not in dispute.

4th. All goods *now* seized, which were in the workshops at the date of the assignment, are not conveyed thereby. If this means that there were goods seized not mentioned and described in the schedules, then the objection is good. As to such goods the Sheriff will proceed.

5th. The description of goods in the schedule and assignment is bad under the statute.

This objection was argued on two grounds. First, that the assignment conveyed such goods as were in the front shop, not in the workshops, or either of them. Second, that the goods themselves were insufficiently described.

As to the first, the assignment speaks of "all the stock in trade, merchandise, goods and effects" in the "shop occupied by the defendant, situate on the south side of King street, in the city of Toronto, and known and numbered 77." Without the aid of a schedule, there might be some difficulty in holding these words sufficient to cover the workshops as well as the shop in which goods were sold; but the assignment proceeds, "which said goods and chattels are particularly mentioned in the schedule annexed thereto and marked A," which schedule begins "stock in workshops," and goes on describing what is therein, and next describes what is in the "Front Store." Taking the two together, I have no doubt all the stock and goods in the continuous shop, consisting of the front store and the two workshops, passed. As to the other difficulty raised, nothing is shewn exterior to the language used to support it. I cannot see that "14,415 feet of prepared moulding" is not a sufficient and full description of the article that the same may be thereby readily and easily known and distinguished. And the same answer may be given to the other articles, as to which was contended the description was insufficient. In most instances there was quantity in all the nature and quality or some descriptive characteristic ex. gr. "crown and plate glass," and in all likewise locality.

7th. "The affidavits bad because sworn before Mr. Leys."

These are the very words of the objection. The affidavits of the two assignees and of the subscribing witness, were sworn before Mr. Leys, who is a duly authorized Commissioner. The objection is that the assignment was prepared by him. But the statute gives no colour for such an objection, nor is there any rule of court on the subject; nor indeed could there be, for the making assignments, mortgages, or bills of sale of chattels, is not a proceeding of which *per se* the courts take cognizance.

9th. "The affidavit of justification not sufficient, in not shewing that the sale at time of execution was *bona fide*."

I give the words here also. The affidavit is sworn on the same day as the deed was executed. Each assignee swears that "the deed of assignment or conveyance, and the sale and assignment therein mentioned and thereby made, are respectively *bona fide*, and for good consideration, as set forth in the said conveyance." The argument is, that at the time of execution the assignment may have been fraudulent though by some unexplained circumstances it may have become *bona fide* at the time of swearing the affidavit. If I could bring myself to adopt and act in the spirit of such an objection, I should be inclined to hold it badly taken, because properly speaking there is no "affidavit of justification," words having a widely different legal meaning, and because the words "at time of *execution*" might by remote possibility refer to the plaintiff's *fi. fa.* and not to the execution of the assignment. But I disclaim any such mode of argument and rest my decision in favour of the sufficiency of the affidavit on the plain and unstrained meaning of the words used.

The last objection is, that Edward's description is not the correct one. This was explained to refer to the affidavit of the *bona fide's* of the assignment in which he is described as "Secretary of the Board of Arts and Manufactures." He has the same *additions* in the assignment, and the description being the same in both we may safely assume "constat de personâ." As to its sufficiency as an addition our statute does not require any, differing from the English statute passed for a similar object.

I decide therefore in favour of the claimants, except as to any goods falling within the remarks made upon the fourth objection. In effect I am strongly inclined to think that the execution creditors anticipated this result, and preferred taking their chance of an adjudication at Chambers to the more expensive proceedings of an issue and trial by jury.

COUNTY COURT CASES.

(In the County Court for the United Counties of Frontenac, Lennox and Addington, before his Honor Judge MACKENZIE.)

MULHOLLAND v. MORLEY.

Action on a Note—Plea, Payment—Necessity for production of Note—Common counts—Plea, Payment—Necessity for evidence as to amount of Plaintiff's Demand.

In an action on a promissory note though the making of the note be admitted for instance by a plea of payment, yet plaintiff must produce the note before having his verdict recorded.

In an action on the common counts for money paid, money lent, goods sold, &c., the plea of payment admits only that something not ascertained was due in respect of the causes of action sued upon, leaving plaintiff to prove the precise amount.

Particulars of demand are no part of the declaration, and are not admitted by a plea of payment on the record.

The first count in the declaration was upon a promissory note made by defendant for $235.

The second count was upon another promissory note, made by the defendant for $225 22.

There were also common counts for money paid, lent and advanced, and for money had and received, goods sold, and an account stated and interest.

The defendant pleaded one plea only, namely, payment before action to the whole declaration.

The following particulars of plaintiff's claim were annexed to the record:—

To paid your note due 27th November, 1859	$215 44
Interest on same	23 65
To paid your note due 27th May, 1860	225 22
Interest on the same	17 48
To paid your note due 27th November, 1860	235 00
Interest on the same	11 75
	$728 49
Credits, composed of sundry items	429 57
Balance due plaintiff	$298 92

There was no special count applicable to the first promissory note mentioned in the particulars.

The cause was tried at Kingston before Judge Mackenzie, at the sittings of the court in September last, 1861.

At the trial the learned counsel for the plaintiff contended that he was not bound to produce the two notes declared upon at the trial, as the plea of payment admitted them. He also declined to give any evidence on the common counts, contending that as the particulars of the plaintiff's claim had been served in detail upon defendant's attorney, and were annexed to the record, that under the plea of payment the amount of $298 92 cents was admitted, and that it was unnecessary for him to produce the notes specially declared upon, or to give any evidence on the common counts

The judge thought that the plea of payment did not operate as an admission of the correctness of the plaintiff's particulars, although it admitted that something was due He thought that the plaintiff was not in a better position than if the defendant allowed judgment by default, in which case some evidence would be required to be given to prove the correctness of the claim under the common counts. He thought the plaintiff should show how much he paid on account of the defendant, as to the first item in the particulars.

The counsel for defendant proposed that a verdict should pass for the plaintiff for $62 17 cents, being the balance between the amounts and interest of the two promissory notes specially declared on, and the amount credited in the particulars. The counsel for the plaintiff refused to consent to such a verdict, as he thought that the plaintiff was entitled to a verdict for $298 92 cts. as made up in the particulars.

Under these circumstances the judge non-suited plaintiff, with leave reserved to him to move in term to set the non-suit aside, and to enter a verdict for the plaintiff for $298 92 cents, in the event of the ruling of the judge being wrong.

In October Term 1861, *A. R. Morris* obtained a rule *nisi* to set the non-suit aside, and to enter a verdict for the plaintiff for $298 92 cents, pursuant to leave, or for a new trial on the ground of misdirection.

D. Macarow showed cause.

A. S. Kirkpatrick supported the rule.

MACKENZIE, Judge Co. C.—There are some English cases which countenance the position taken by the plaintiff at the trial, in reference to the non-production of the notes declared on; but the cases do not appear to be uniform in this respect.

Interest on the notes was claimed in the plaintiff's particulars. And the English cases decide that the notes must be produced before interest can be recovered.

In this country some of the judges require that the notes or bills must be filed in the court before the recording of the verdict, and others do not. The non-filing of notes and such papers upon which judgment pass leaves a door open for mischief and trouble. It is a bad practice and should not be allowed. Evils arising out of it have have been disclosed in this court before me once, and in the Division Court more than once. Such notes some way or other have found their way into irresponsible hands and parties have been sued upon them a second time. True the nefarious attempts had been defeated by trouble and expense, unfortunate defendants having to pay a second bill of costs. In this court, unless otherwise decided by an appellate jurisdiction, it will be necessary to file such notes and such papers before the recording of the verdict.

As to the other point, whether the plea of payment admits the correctness of the plaintiff's bill of particulars annexed to the record or not, I have not been able to bring my mind to adopt the view of the matter as urged on behalf of the plaintiff at the trial and upon the argument in banc.

The plea of payment, like other pleas which do not deny the cause of action set forth in the declaration, implicitly admits the contract or cause of action declared upon, and that the plaintiff is entitled to recover something. When pleaded to the common counts it admits some contract of the nature declared on, but does not admit a particular amount, or particular items, or a bill of items.

I find it laid down in the last edition of Archbold's Practice, page 1388 "That the particulars are not to be considered as incorporated in the declaration, nor do they form any part of, nor can they have the effect of a pleading; nor can they be looked at with a view to construe the pleadings; the plaintiff may apply them to any count in the declaration to which they are applicable."

In a note in Harrison's Common Law Procedure Acts and Rules, at page 263, I find the following observations: "The office of a new assignment is particularly to explain that which is left ambiguous on the face of the declaration owing to its generality. Particulars of demand have the same effect, though they form no part of the record. One object of a bill of particulars is to control the generality of the declaration. The chief object of a bill of particulars is, to give substantial information to the defendant of plaintiff's demand, and in order to limit the proof of the latter to the cause of action in the declaration mentioned."

In the case of *Russell* v. *Bell*, 10 M. & W. 339, Lord Abinger, C. B., said:—"It is perfectly novel to say that a plea is construed by, or has any reference to a bill of particulars The plea is to the declaration, and to nothing but the declaration."

In the present declaration it is alleged on the common counts, in general terms, that the defendant is indebted to plaintiff for money paid, for goods sold, for money lent, for money had and received for plaintiff's use; and for interest and upon an account stated. All then, that the plea of payment admits is those general allegations in the declaration, and that *something* is due or claimed on them. It does not admit the bill of particulars, nor any item in it, or any particular amount to be due. The plaintiff cannot be better off with a plea of payment on the record than he would be if the defendant had pleaded no plea at all. In this respect; a plea of payment to the common counts, admits no more than a judgment by default would admit.

In Chitty General Practice, vol. 3, page 673, I find the law laid down thus—"The suffering judgment by default (except in debt) only admits the precise allegations in the declaration, and that something is due or claimable; and where the declaration is general, as for work, and labour, and materials, the defendant on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses, who are called to prove the work done as to whether the work sworn to by them was or was not done on the defendant's retainer."

In the case of *Williams* v. *Cooper*, 3 Dowl. 204, Parke, B. said—"A judgment by default admits something to be due, but disputes the amount."

It seems then, that in action of assumpsit for goods sold, or work done, or money paid, a plaintiff is not in strictness relieved by a judgment by default from the necessity of proving the delivery of each article, or the extent of the work done, or the particular sums of money paid; though, certainly, in practice, when a defendant has not by plea denied the plaintiff's action, there is generally a strong feeling on the part of the jury, when executing a writ of inquiry, to be satisfied with slighter evidence than on a trial.

In England when judgment by default is signed on the common counts, the amount due to the plaintiff in respect of the same is ascertained by means of a writ of inquiry.

In Upper Canada such amount is ascertained at the Assizes or at the sittings of the County Courts by a jury, in the form of assessment of damages.

I cannot see how the 15th section of the Common Law Procedure Act can be construed so as to help the plaintiff out of his difficulty, as was suggested at the argument. In case a defendant does not appear in due time to a writ of summons, with a special endorsement of particulars on it, as mentioned in the 15th section, the plaintiff may, under the 55th section, sign final judgment for any sum not exceeding the sum endorsed on the writ. Alderson, B., in *Rodway* v. *Lucas*, 672, said, "It seems to me that the special endorsement allowed by the statute is of a claim only, and the defendant, if so disposed, may dispute it by appearing, and then the special endorsement assumes the form of particulars of demand."

In the present case an appearance has been entered, a declaration served, and a plea pleaded; consequently, the special endorsement upon the writ has assumed the form of ordinary particulars of demand, which are not affected by the action in question.

I think that the court has no authority, under the circumstance, to order a verdict to be entered for the plaintiff in the terms of the rule; and according to the views I have just enunciated there was no misdirection, consequently there can be no new trial for misdirection.*

* Counsel for defendant afterwards consented to the rule being made absolute for a new trial on payment of costs, and the rule was issued accordingly,

ENGLISH CASES.

PRIVY COUNCIL.

(From the "Law Times.")

(Present—The Right Hon. Lord Kingsdown, Sir E. Ryan, and Sir J. Romilly.)

Bank of Montreal v. Simson.

Guardian—Power of, according to law of Canada—Sale of infant's real and personal estate—Voidable sale.

A tutor or guardian, according to the laws of Lower Canada has no power without leave of the court to sell his ward's immovable property, nor any portion of the ward's mixed property, nor any part of the moveable property, except what is unproductive of revenue, or of a perishable character, and even then he cannot sell it if it is in the nature of an heirloom, as to which a hereditary pretium affectionis is attached. The burden lies on the tutor to shew the property sold fall s within the above description, and if he fails to do so the sale is actually void, and not merely voidable. The sub-tutor's duty is to watch over the tutor.

This was an appeal from a decision of the Court of Queen's Bench in Lower Canada.

The question involved was the extent of the authority of a tutor over the property of his ward, according to the law of Lower Canada, which is the old French law.

An infant named Eleonore Simson was born in 1835, and her property consisted of shares in the Bank of Montreal. She had a tutor and sub-tutor regularly appointed. The tutor sold these shares in 1848 and 1849. The infant, on arriving at majority, instituted proceedings, and claimed the dividends on the shares from the date of the alleged sale, seeking to treat the transfer as void. The Court of Queen's Bench held that the tutor had no power to sell the shares. An appeal was now brought to her Majesty in Council.

The *Solicitor-General* (Palmer) and *C. E. Pollock* for the applicants,

Wickens for the respondents.

Judgment was delivered up.

Sir J. Romilly (who, after stating the facts and authorities at length, thus summed up their result):—After carefully examining the various authorities and the writers on this subject prior to the enactment of the French Codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though various passages may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or irreconcilable diversity of opinion appears to exist between them, and that the result of the law, so far as it is applicable to the case before us, may be thus stated: The tutor's duty is to make an inventory of all the property of his ward, and to take an administrative care in the protection and management of it; but without the sanction of a court of justice having been previously obtained, his power does not extend to selling any portion of the immovable property of his ward, or any portion of that property which is of mixed character; and further, that his power is also restricted from selling any portion of the moveable property of the ward, without the intervention and previous sanction of a court of justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily either cease to exist, or will, from permanent causes, become deteriorated in value at the period of time when the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heirlooms as to which an hereditary *pretium affectionis* is attached. Although this is an incomplete statement of the law, it is, we think, accurate and sufficiently comprehensive for the purposes of this case. It has been contended on behalf of the applicant, that, as in the civil law the original principle was that the tutor stood in the place of the father, and was dominus of the property of the ward, and as such had power to dispose of all of his property, the case must be considered as one in which the burden of proof lies on the respondent to establish that the property in question falls within the range of the various classes of property, which, by regulations made subsequent to the original law, should be excepted from the general rule which gave the tutor complete control: these exceptions, it is said, were of three sorts: first, immoveable property; and next, *quasi* immoveable property, which was called "*immeubles fictifs*;" and thirdly, moveable property of a peculiar value as possessing a *pretium affectionis*, and being in the nature of heirlooms: that these were the only three classes of property excepted from the control of the tutor. That all property not falling within one of these three classes is still subject to the general control of the tutor, and that bank shares do not fall within the description of any one of these classes of property, and consequently that the power of the tutor over them was absolute, and the right of the respondent to recover them gone. But this is not the view we take of this case: we think that the Edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that if the matter had remained as fixed by that edict, such must be considered to have been the law of France prior to the year 1560. And we also think that the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified, and this only with the previously obtained sanction of a court of justice. Although the various authorities cited to us are susceptible of various meanings, and without some qualification of the generality of their terms are not entirely reconcillable, yet this is, we think, the general effect of them; and this view is confirmed by the cases cited and commented upon in such authorities; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the State, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of *immeuble fictif*. But the case proceeds to say: "Il en serait de même s'il s'agissait d'une chose purement mobillaire, mais d'une grand valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession." If this be the correct view of the case, the burden of the proof falls on the applicant to show that the bank shares fell within the property which DeLisle as tutor was entitled to dispose of without the sanction of a court of justice. It is always to be borne in mind that, as the wants and exigencies of society increase new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply; but we entertain no doubt, upon a full review of this subject, that the bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a court of justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to rise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned, between the shares in the Montreal Bank and shares in the Company of the Bank of England, and stock in the English or foreign funds, and that the sale and realisation of such property requires the interposition and sanction of a court of justice, and the re-investment of the proceeds in property producing a permanent income, according to the terms of the Ordonnance of Orleans. It has also been argued before us, that the power of the tutor is, by all the authorities, held to include administration, and that administration necessarily includes sale. But we dissent from that argument: we think that the supposition that the administration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which, in its technical sense, applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the limited and qualified extent already pointed out. It is partly for this reason we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the English tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case. Neither have we thought it of any moment to consider the articles in the present French code, or the discussions in the conferences, which took place when that code was framed, except so

far as these conferences illustrate any ambiguous point in the earlier law which up to that time obtained in the kingdom of France. So far as these latter have any bearing on the subject, they concur in bringing us to the conclusion already stated, that by the law of France prior to that period, and which is that now in force in Lower Canada, it was not in the power of the tutor to sell the bank shares without the assistance and sanction of a court of justice. The next question to be considered is, the effect of the sale which has actually taken place, and the transfer of these shares to persons who are strangers to the record. It is argued by the counsel for the applicant, even on the assumption that the tutor exceeded his authority, still that the sale was good; and that, assuming that the transfer ought not to have been made, still that, being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that, if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the court to answer to a matter in which they were so materially interested. We are of opinion, however, that the act of the tutor, exceeding the limits of his power and the scope of his authority, is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refere to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his Traité de Personnes, part 1, titre vi., art. iii., s. 2. (The passage indicated was here read.) That passage, besides bearing on the point now being considered, is useful also as pointing out that in the sense in which the word "administration" was employed by the French jurists on this subject, it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immovable property, but the principle is the same with respect to all property sold by the tutor which he had no power to sell, and which the authority of a court of justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is, in fact, the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then, by fraud or forgery, induced the bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them. Though it cannot, in our opinion affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor Robert Simson, on the 29th September 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the bank that DeLisle the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of DeLisle seem also to have been notorious, and likely to be known to the bank, in which case it was probable that any sale by him would be for his own sole advantage. The functions and duties of the sub-tutor seem to be not very clearly defined; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavour to prevent injury to be inflicted on the person or or property of the ward. Nothing could be more formal or precise than the notice served by him on the bank in that character, which is set out in the case; and as the bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took away no property from her, and that the decision of the Superior Court of Lower Canada and of the Court of Queens Bench is correct, and must be affirmed with costs; and they will humbly advise her Majesty accordingly.

Decree affirmed with costs.

Applicant's solicitor, *Bischoff*, *Coze* and *Bompas*.
Respondent's solicitor, *J. H. Mackenzie*.

COURT OF ARCHES.

(From the "*Law Times*" *Reports*)

The Office of Judge promoted by BURDER v. HEATH.

Articles of religion—Repugnant doctrines—Obligations of the clergy.

The obligations of the clergy are twofold: first, to declare assent and consent to the Book of Common Prayer; second, to subscribe the Thirty-nine Articles of Religion.

The court will not take into consideration the internal convictions or animus with which the Articles are subscribed, it will only examine the doctrines impeached, and see if they violate the plain grammatical sense, the court will hold that such opinion might be lawfully avowed and maintained.

The construction which the court will put upon those documents is a legal construction.

If the Article admits of several meanings, without any violation of the ordinary rules of construction or the plain grammatical sense, the court will hold that such opinion might be lawfully avowed and maintained.

If the doctrine in question had been held without offence by eminent divines of the Church, then, though it might be difficult to be reconciled with the plain meaning of the Articles, blame will not be imputed to those who hold it.

This court will not question doctrines that have been allowed or tolerated in the Church.

In construing sermons, the court will not be bound by the strict rules which are applied to the construction of the Articles and Book of Common Prayer, but it will allow of a greater latitude of interpretation, and will permit it to be shown that the preacher did not intend to contravene the statute of Elizabeth, or to promulgate doctrines inconsistent with the Book of Common Prayer.

The court will not for this purpose assume that anything was done or intended to be done by the authority of the Legislature or of the Church, which it did not find within the four corners of the Articles and the Book of Common Prayer, and, on the other hand, it will not assume that anything therein found was not intended to have its full effect and operation.

There are many matters of doctrine dehors both the Articles and the Book of Common Prayer, as to which entire freedom of opinion is allowed. But it is settled law, admitting of no discussion, that the Articles and the Book of Common Prayer must be taken by all who have subscribed them to contain the doctrines of the Church of England, and that these are, so far as there set forth, accordant with Scripture.

In the construction of the statute 13 Eliz. the word "advisedly" means "deliberately," as contrasted with "inadvertently" or intentionally," that is to say, with an express or avowed purpose.

The intention will be gathered from examination of the acts complained of.

What doctrines are held to be in contravention of the Articles and Book of Common Prayer.

The statute leaves a locus penitentiæ to the defendant, who may retract before sentence passed.

(November 2, 1861.)

This case was argued in June last, and his Lordship took time to consider his decision. The questions involved in it, and the form in which they were raised, are fully stated in the judgment.

Dr. Twiss, Q.C., and *Dr. Swabey* for the prosecutor.

Dr. Phillimore, Q.C., and *Bullar* for the defendant.

DR. LUSHINGTON said:—Early in the year 1860 a suit was instituted in this court by the direction of the Bishop of Winchester, against the Rev. D. I. Heath, a clergyman beneficed in that diocese. The object of that suit was to prefer certain charges against Mr. Heath, for having printed and published several sermons, called "Sermons on Important Subjects," parts of which were alleged to contain doctrines repugnant to the Articles of Religion, in violation of the statute of Elizabeth and in derogation of the Book of Common Prayer. I must presently enter minutely into the consideration of the articles which contain these charges, but this general description will suffice for my immediate purpose—namely, to make some general observations as to the principles which I believe ought to guide the court in the consideration and decision of cases of this description. The court is fully aware of the deep responsibility which attaches to it in the exercise of this jurisdiction. Questions may arise most important to the Established Church. The abstruse nature of the subject-matter itself, the doctrines of the Church of England, may necessarily introduce considerations of great difficulty. A miscarriage by this court, even if corrected by the court above, would be a serious evil. Again, in weighing the importance of such cases, the court must never forget that the character and interests of the party proceeded against are most deeply involved. It may be meet, in the first instance, briefly to recapitulate the obligations which the clergy of the United Church are by law to undertake. They are twofold: they must declare their assent and consent to the Book of Common Prayer, and they must subscribe the Thirty-nine Articles of Religion. In the course of the argument addressed to the court on the part of Mr. Heath, much was said as to the *animus* with which a subscription to the Articles might be made, and the authority of Dr. Paley was cited upon this subject. I disclaim

entering into any examination of this argument, for I think that it does not belong to the court to discuss it. I have nothing to do with the internal convictions of any persons subscribing the Articles; neither I nor any other court can know what are the opinions of individuals when they affix their subscriptions — that is a matter to be governed by their own consciences. It may be quite right and fitting that learned divines should discuss the limits within which a person can conscientiously subscribe, but these are not questions for a court of justice. Disquisitions on this subject afford no assistance to the court, and I cannot consent to import into this case or any other similar case the words of learned divines so far as they relate to the *quo animo* with which the subscription may be affixed. The province of a court of justice, when compelled to perform the duty, is to examine the doctrines impeached, and to see that they do not violate the plain intent and meaning of the Book of Common Prayer or the Articles of Religion. I cannot disguise from myself that in discharging the duty now imposed upon me there are three difficulties which are not to be found in the ordinary course of justice. Such cases as the present are of very rare occurrence, and though the general principles which ought to guide the court may, to a certain extent, be extracted from the few preceding cases, yet there are not, and there cannot be, any institutional writers to whose authority, as in ordinary legal questions, the court could with confidence appeal; nor are there any decided cases as to the actual construction which ought to be put upon the Articles. True it is that there are a multitude of the most learned works by the most eminent divines as to the meaning of those Articles. But the court cannot venture to make much use of such assistance, and for this reason, that such works naturally and properly constantly refer to the Holy Scriptures. The court, however, ought not to enter into so wide a field of investigation, except so far as may be absolutely necessary to the discharge of its proper duty — viz., the ascertainment of the plain grammatical meaning of the Book of Common Prayer and the Articles. The construction which the court must put upon the Book of Common Prayer and the Articles is a judicial construction. I should not presume to adopt any authority, however high, even though in my own most fallible opinion supported by Scriptural quotations, unless such authority concurred with the plain grammatical meaning. With great anxiety, then, I have sought to ascertain what are the principles which should govern the court and guide its judgment in all cases in which charges of false doctrine are preferred, or similar questions demand solution. It is a satisfaction to my mind that the principles generally applied to all this class of cases have to a very considerable extent been enunciated by the court of the highest authority in these matters —I refer to the decision of the Privy Council in the *Gorham* case The judgment therein delivered, being a decision of the Superior Court, is legally binding on me, so far as it declares principles applicable to the trial of the present cause. It is true that I was one of the judges in that memorable case; but the judgment stands upon the authority of Lord Langdale, Lord Campbell, Lord Wensleydale and Lord Kingsdown, approved by the two Archbishops of the realm. I think that the leading principles there laid down stand also, and most firmly stand, upon the stable basis of sound reason and justice. These principles must govern the present case, and would do so even if the particular decision had been erroneous. In the *Gorham* case the proceedings were civil, and concerned only civil rights, but the rule of construction of the Articles of Religion, the Book of Common Prayer, and the doctrines impugned, must be equally applicable to the present proceeding. In both cases there is the same issue, at least substantially; in both cases the question is, whether the doctrines be or be not contrary and repugnant to the Articles of Religion and the Book of Common Prayer. The following passage occurs in Mr. Moore's report of the judgment of Lord Langdale in the *Gorham* case, page 462:—"This question must be decided by the Articles and the Liturgy, and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed. In our endeavour to ascertain the true meaning and effect of the articles, formularies and rubrics, we must by no means intentionally swerve from the old established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past, as being, on the whole, best calculated to determine the true meaning of the documents to be examined. If these principles were not adhered to, all the rights, both spiritual and temporal, of Her Majesty's subjects would be endangered." These were the principles by which he purposed to abide, remembering, however, that this was a criminal proceeding, that the offence charged must be clearly proved, and that if doubt existed the accused was entitled to the benefit of it. His Lordship then stated the various steps which had been taken in the suit since its commencement in 1860, and added that the case was fully argued towards the end of last June. He was always, he continued, most anxious to avoid unnecessary delay in the adjudication of the causes in the courts in which he had the honour to preside, but a press of business always prevailed at that period of the year, and the subject matter of this suit was in itself so important and so difficult, the possible consequences of error so serious, not only to Mr. Heath personally, but also it might be to the interests of the Church, that he deemed it his duty to take such time for deliberation as he could only appropriate to the task during the long vacation. In considering how the principles laid down by the Privy Council were applicable to this case, he apprehended that the course to be followed was, first, to endavour to ascertain the plain grammatical sense of the Article of Religion said to be contravened, and if that Article admitted of several meanings without any violation of the ordinary rules of construction or the plain grammatical sense, then the court ought to hold that any such opinion might be lawfully avowed and maintained. If, indeed, any controversy arose whether any given meaning was within the plain grammatical construction, the court must form the best judgment it could, with this assistance—that, if the doctrine in question had been held without offence by eminent divines of the Church, then, though, perhaps, difficult to be reconciled with the plain meaning of the Articles of Religion, still a judge in his position ought not to impute blame to those who held it. That which had been allowed or tolerated in the Church ought not to questioned by that court. In construing Mr. Heath's sermons, however, the court was not bound down by the same strict rules which applied to the construction of the Articles or the Book of Common Prayer, and therefore it might be that a greater latitude of interpretation should be allowed, and the fullest possible means should be permitted for showing that Mr. Heath did not intend to contravene the statute of Elizabeth or promulgate doctrines inconsistent with the Book of Common Prayer. This was the course he was bound to follow, but there were also things to be avoided. The court must never assume for the purposes of this case that anything was done, or intended to be done, by the authority of the Legislature or of the Church of England, which it did not find within the four corners of the Articles of Religion and the Book of Common Prayer; and, on the other hand, it must never assume that anything therein found was not intended to have its full effect and operation. It was contrary to all probability, as well irreconcilable with the ordinary rules of construction in so solemn a proceeding as the establishment of the Articles of Religion or Book of Common Prayer, to presume that anything was inserted to be inoperative or rejected. For caution's sake, he would say that he fully recognised the position of the Judicial Committee, that there were many matters of doctrine *dehors* both the Articles of Religion and the Book of Common Prayer, as to which entire freedom of opinion was allowed. It must, however, be assumed as a matter admitting of no doubt, and respecting which the court could hear no discussion, that the Thirty-nine Articles and the Book of Common Prayer being established by the highest authority in this realm, must be taken by all who subscribed thereto to contain the doctrines of the Church of England, and, so far as therein set forth, to be accordant to Scripture; these were nearly the words which were used in the *Bath* case, and to which he adhered. His Lordship then read the terms of the 13th Elizabeth, and the construction which he had put upon the word "advisedly" in that statute giving judgment in the *Bath* case. One meaning of the

word was "deliberately," as contrasted with inadvertently. Another meaning was "intentionally," with an express and avowed purpose. But there was great difficulty in putting the second construction upon the word, for it was hardly possible that a clergyman who had signed the Articles would preach or publish anything with the avowed intention of contradicting them. The question of intention was of the last importance, but the court could only arrive at a conclusion upon that question by an examination of the acts complained of; for in all the transactions of life a man must be judged by the consequences of his acts, and he must be taken to intend that which was the effect of what he had deliberately done. He must apply these same principles to the present case, and hold that the printing and publishing a set of sermons was an act done "advisedly." With these observations, he proceeded to examine each of the four accusing articles. The sixth article alleged that certain passages in Mr. Heath's sermons contained doctrines contrary and repugnant to the eleventh Article of Religion. He must compare the passages with that Article. He felt this to be an arduous duty, and he should take especial care not to travel beyond the necessity which the law imposed upon him; but he must, in some part of this judgment, to a certain and limited extent, express a judicial construction of the eleventh Article; for how could he compare the passages in the sermons without so doing? The judicial construction was the plain grammatical sense of the Article It was no part of his province, and he distinctly disclaimed any attempt, to affix any meaning to this Article by any reference of his own to the Holy Scriptures; but he apprehended that, in case of doubt and absolute necessity, he should be justified in having recourse to the opinions of learned divines of the Church. The first difficulty he had to encounter was that, in ascertaining the plain grammatical meaning of the Article, he had to affix a meaning to words which had not by any commanding authority had any precise meaning affixed to them, and which words might, if Bishop Burnet were right, have been used in the New Testament in different senses. He was then, by the necessity of the case, coerced to give his own construction of the eleventh Article of Religion. First, he held, with Bishop Burnet, that by justification was meant being received into the favour of God; secondly, that the merit of our Saviour was the great cause of that reception; thirdly—and what on the present occasion was perhaps most important—that the person so to be received must have faith in the redemption of mankind through Jesus Christ. He did not enter into the consideration how far a very extended meaning might be given to the expression "by faith;" it sufficed for the present purpose to say. "faith in the redemption through Jesus Christ," and that it must be faith in the person to be justified. As to the latter part of the interpretation, he thought he was confirmed by the grammatical construction; the words which followed were, "and not for our own works or deserving;" the necessary inference was that "our *own* faith" was contemplated as well as "our *own* works." The thirteenth Article supported this construction, for there faith in Jesus Christ appeared to him clearly to denote faith in Jesus Christ in the person to be justified. If it were necessary to construe the remaining part, he should say that the words "we are justified by faith only" might mean that faith was indispensable, and without it there could be no justification. The essence of this Article was merits in the Redeemer, faith in the person to be justified. His Lordship then referred to the voluminous extracts from Mr. Heath's sermons set out in the articles, and said that the charges against them, compressed, were, that Mr. Heath affirmed that justification meant the doing strict justice to all both good and bad, and that justification by faith meant justification by the faith of our Saviour in his own Gospel, or our Saviour's trust in the future. He had duly considered these extracts, and he was of opinion that the doctrines maintained by Mr. Heath in the extracts from pages 22 and 23 did not contain the legal and correct explanation of the word "justification." He thought there was a misuse of words, and that an erroneous meaning, not permitted by law, had been attached to the word "justification," as used in the eleventh Article. He thought that every clergyman of the Established Church was bound to bear in mind the Articles of Religion in every sermon which he preached and published. He thought that if in such sermons he maintained a doctrine contrariant and repugnant to the Articles, it was no excuse for him to allege that he did not bear in mind the Articles, and had no intention of contravening them But, although he deemed this position undoubtedly true, he was also of opinion that it ought not to be pressed with extreme rigidity. But in the passage to which he had referred it was possible that Mr. Heath might have meant, there being no reference to redemption by our Saviour, that the justification of which he was then speaking was simply that the Supreme Being would put all things to rights according to His wisdom. Much as he reprobated the passage as mischievous in every point of view, he should be very reluctant to conclude, if it were isolated, that such single passage was adequate proof of the charge laid in the sixth article. But there were other passages which he could not reconcile with any possible construction of the eleventh Article. That Article expressly declared that justification sprang from the merits of our Saviour, and in no respect whatsoever represented justification to mean the doing strict justice to all, though it might be, and he believed it to be, true that in the scheme of redemption, mercy and justice might be so combined that no violation of justice would take place. In other passages Mr. Heath introduced a new ingredient—namely, the personal faith of our Saviour, of which no mention was made in the Article, and which placed justification on a different ground. The Article declared justification to be by the merit of our Saviour, and by the faith of the person to be justified. To place justification upon the personal belief of our Saviour was, he thought, in opposition to the Article itself; for any essential addition to the Article could not be consistent with the Article, which purported to describe all that constituted justification. He could not consider it a harmless innovation, for it discarded the conditions of the eleventh Article, and substituted another instead; and this erroneous doctrine was again repeated in stronger terms. Mr. Heath said: "When I talk of justification by faith, I mean justification by our Saviour's trust in the future. The Saviour still trusts in our Father as He always did; He still has faith, and His faith still works by love; He still believes He can put the world right, and I believe so too." He was under the painful necessity of saying that he could not reconcile these doctrines with the plain grammatical sense of the eleventh Article. He thought that they were contrariant and repugnant thereto, and he must pronounce accordingly. His Lordship next examined the seventh article, wherein it was alleged that the passages extracted were repugnant to the second and thirty-first Articles of Religion. The plain meaning of the conclusion of the second Article was, that through the suffering and death of our Saviour, His Father was reconciled to us. He was well aware that very much discussion had arisen as to the meaning of the word "reconciled." The ordinary meaning of the word "reconciled," when speaking of two persons, he took to be the removal of some hostile or angry feeling which subsisted between them. When speaking of the Deity we must be careful not to attribute to him the feelings which belonged to man. The best construction that he felt himself at liberty to put upon the word "reconciled" was the removal of that obstacle which, from the sin of man, existed to his reception into the favour of God, and that being reconciled he would be so received into that favour. Upon a consideration of the second and of the thirty-first articles, he could not but think that whoever alleged that the death of our Saviour was not the means of reconciling His Father to us, or who denied that the death of Christ was a perfect propitiation for the sins of the world, must necessarily contravene those two Articles. The question therefore was, whether Mr. Heath had avowed such denial. He need not say that that he considered this question—namely, how it was effected — to be one of the mysteries which it had pleased Providence to leave incapable of being explained by man, and he was relieved by thinking that it was his duty merely to ascertain whether the doctrine therein contained had been denied or not. He was in no respect called upon to offer any explanation. His Lordship referred to passages in the sermons which, he said, appeared to him to deny that God was propitiated by the sufferings and death of our Saviour, and not only to deny that doctrine, but to allege that His blood was shed for another purpose. His Lordship next referred to the eighth article, charging Mr. Heath with having advisedly maintained doctrines repugnant to the Apostles' Creed, which declared our belief in the forgiveness of

sins, and to that part of the Nicene Creed which declared our belief in one baptism for the remission of sins. It was also charged that these doctrines were repugnant to the eighth, twenty-seventh and sixteenth Articles of Religion. After reading those portions of the Creeds which referred to those points, his Lordship said that the result of them was that forgiveness of sins was avowed and acknowledged as a part of the doctrines of the Church —forgiveness of sins through the merits of the Saviour by faith and repentance; and the question was whether this doctrine had been denied by Mr. Heath. The first passage bearing upon the question was at p. 161: "For myself I feel beaten to the very ground at the enormity of the task of persuading all England to reject totally the forgiveness of sins as having anything at all to do with the Gospel." If this passage stood alone, if it were not altogether qualified, and a construction put upon it by other parts of the sermon adverse to its *primâ facie* meaning, he did not see how it was possible that any interpretation of its meaning should not convey the doctrine that Mr. Heath denied the forgiveness of sins, nor could he entertain any doubt that a denial of the forgiveness of sins was contrariant and repugnant to the Creeds and Articles. His task, therefore was narrowed to this — whether he could find in this sermon any satisfactory explanation of the passage he had read. He could find none. The remaining charge was that contained in the tenth article, which charged that certain passages were repugnant to the second Article of Religion, that other passages were repugnant to the Creed of St. Athanasius, to the Apostles' Creed, and to the Nicene Creed, and also complained of a violation of the thirty-first, the sixth and the eleventh Articles. In considering the question whether Mr. Heath had contravened a meaning, as far as he knew, disputed by none, he confessed that he had had great difficulty in believing that Mr. Heath did really mean to express the opinions which his words conveyed, such opinions appearing to him to be entirely contrary to those which any clergyman ought to declare; but he was not able to discover any clue whereby he could venture to say that those opinions were qualified, and to be understood in a different sense from that which *primâ facie* belonged to the words used. At page 117 of the sermons was the following passage: "The more I study my Bible for myself the more astounding I find it— how many of the most fundamental ideas and phrases of modern theology have been foisted in without sanction from that all sufficing record of our religion. One after another, no less than about twenty ideas or phrases, such as guilty of sin, paying a penalty, going to heaven, going to hell, immortality of the soul, satisfaction, imputed righteousness, appropriating the work of Christ, necessary to salvation, and many others, have vanished from my system, because, as a minister of Christ, studying these matters professionally, I see them to be phrases and ideas not only absent from Scripture, but darkening and confusing the clearest of the otherwise most intelligible and comforting statements of Holy Writ." The effect of this passage was—first, that guilt of sin had vanished from Mr. Heath's system, because such a phrase and idea were absent from Scripture and darkened the most intelligible and comforting statements of Holy Writ. Now, what said the second Article? That our Saviour died to reconcile us to the Father, and to be a sacrifice not only for original guilt, but also for the actual sins of men. He really could not comprehend how any intelligible meaning could be affixed to this Article, if guilt of sin was to be removed from all Christian doctrine. He could not conceive the idea of actual sin without there being guilt of sin. He should not dwell upon the other expressions which were alleged to be repugnant to the Creeds. He viewed the whole of the passage with astonishment and regret. He thought the words used contained a doctrine, if it was to be so called, utterly irreconcilable with the Creeds. The thirty-first Article was next to be considered. Mr. Heath dismissed from his system the immortality of the soul, satisfaction, imputed righteousness, as darkening and confusing the clearest and the most intelligible and comforting statements of Holy Writ. The thirty-first Article said that the offering of Christ was a perfect satisfaction for all the sins of the world. To deny satisfaction altogether, whatever might be its meaning, as Mr. Heath had done, could not be taken in any other sense than a denial of the truth of the Article itself. The next charge was that Mr. Heath had maintained that the phrase "necessary to salvation," was not only not a Scriptural phrase but a phrase which darkened and confused Holy Writ. Passing by the Creed of St Athanasius, he would refer to the very words with which the sixth Article commenced: "Holy Scripture containeth all things necessary to salvation." What did Mr. Heath mean by the omission of words as contrary to Scripture, which words contained the very essence of the Article itself? It is with great regret, his Lordship continued, that I have felt myself compelled by a sense of duty to declare that I have no other alternative but to pronounce a judgment condemning Mr. Heath as guilty of the charges preferred against him—namely, preaching doctrine contrariant and repugnant to the Articles of Religion cited in these proceedings. The defence has been maintained with great zeal and learning, and many ingenious arguments have been urged upon the court; but I must say that what the court wanted from the beginning has never been supplied — namely, some kind of exposition of the doctrines preached by Mr. Heath which could by any possibility, however remote, be reconciled with the plain grammatical meaning of the Articles charged to be contravened. I would with pleasure have accepted in excuse for Mr. Heath any explanation of his doctrines which by any reasonable effort of the understanding could be reconciled with the doctrines of the Church. There has been a complete failure in that respect, not from any want of learning, diligence or ability of counsel, but because it was not possible rationally to affix any innocent meaning to those doctrines which Mr. Heath has so unfortunately promulgated. I trust I may confidently affirm that I have come to the consideration of this painful case with no disposition to press the clergy of this realm to any narrow construction of the doctrines of the Articles of Religion, but to allow every possible interpretation which would not violate their essence and spirit; to go further would be to abandon the duty of the office I hold, and to do that which the Legislature alone could do—to release the clergy of the Church of England from the obligations contained in the Articles, and to repeal by judge-made law the provisions which Parliament has thought fit to enact by its authority. Before concluding, I think it right to explain why I do not advert to the many authorities which the zeal and learning of counsel have produced. My reason is this, that in my judgment not one of these authorities does that which was required in this case—namely, show that some divine of eminence has held without reproach from ecclesiastical authority doctrines in substance the same as those Mr. Heath has promulgated. Whatever opinions may have been held in the vast field of polemical divinity, I find none which can support Mr. Heath or justify him. In the *Gorham* case the Judicial Committee had the advantage of being able to quote in support of their judgment, and in justification of Mr. Gorham, passages from the writings of divines of the highest authority. I cannot conclude this judgment without observing that I am well aware of the fallibility of my own opinion, and especially in so peculiar a case as the present; but I have endavoured, first, to make clear the principles which I intended should govern me; and, secondly, to show plainly how I applied those principles to the case before me. If I have erred in either particular, the judgment of a Superior Court will correct me. It may be, however, that many will think that, though legally right, this judgment recognises too severe restrictions upon the clergy, and shuts the door against inquiry and disquisition, which might tend to elucidate the truth. Now, even if this were true, it is not for a court of justice to open a door which the Legislature has shut. It is contrary to all sound principle for a court to seek, as has been formerly done by some judges, ingenious subterfuges to evade or weaken the law, and that upon a notion of its own power to discover what is best and most convenient. Such a course is, I think, not only contrary to principle, but would be most injurious in its effect, for all such attempts to wrest the law according to supposed consequences invariably tend to postpone a remedy if there be a real evil. If there be bonds which press heavily upon the clergy—as to which I give no opinion — I repeat that the Legislature imposed them, and the Legislature alone can loose them. I pronounce against Mr. Heath.

Bullar asked his Lordship to allow the defendant time to consider what course he should take after the judgment that had been pronounced. Under the statute retraction was open to Mr. Heath.

His Lordship said he would allow ample time for consideration and the cause was accordingly postponed for that purpose.

GENERAL CORRESPONDENCE.

Municipal Law—Qualification of voters—Duty of Returning Officer.

TO THE EDITORS OF THE LAW JOURNAL.

29th November, 1861.

GENTLEMEN,—As the municipal elections are drawing near, and one or two points are likely to be argued at the polling place in this municipality, the same as on former occasions, I have taken the liberty of soliciting your opinion thereon, for the benefit of myself and fellow clerks.

You have herewith a copy of the heading to an assessment roll.

NAMES OF TAXABLE PARTIES.

1	2	3	5	6	7
Nos.	Occupants.	Profession, Occupation, &c	House holder	Age.	Owners and Address.
1	John Brown	Yeoman	H.	33	Alfred Jones.
2	James Brown	Yeoman	H.	33	Peter Thompson.

1. Are persons named in column 7, under the title "Owners and Address," entitled to vote; and if they are, must the amount assessed be $40 annual value (in *towns*) to entitle occupant and owner to vote; or in case the amount should be less than $40, which of the two, or can *either* of them, vote; or would $20 be sufficient to qualify both. See sec. 79 of Municipal Institutions Act (Manual); and also 1 and 2 in accompanying heading?

2. Again, must the amount to qualify be a distinct assessment? Thus—an owner may be named in column 7 as the owner of several tenements, assessed in column 2 to different occupants, one of which would not qualify the owner. Can the qualification be made of one or two assessments of that kind?

3. Again, if a person is assessed in column 2, as owner or occupant, for $12, and in another part of the roll, in column 7, sufficient to make $20, will that qualify?

4. Again, if two persons are assessed jointly for $36, neither is qualified. But half of this assessment is $18: if one of them is assessed for $2 elsewhere, making $20, is that a qualification?

5. Is a returning officer bound to administer the oath, when required to do so by a candidate or voter, when he himself *knows* that the person taking it will commit perjury?

6. If a person comes forward and represents himself as another individual and votes, can the *right* person afterwards vote upon taking the oath?

Yours respectfully,

A TOWN CLERK.

[In answer to queries 1, 2, 3 and 4 we can only refer our correspondent to the report of *Reg. ex rel McGregor* v. *Ker*, 7 U. C. L. J. 96, and ask him carefully to peruse the same.

In answer to query 5, we must refer to sec. 97, sub-sec. 9, of the Municipal Institutions Act.

In answer to query 6 we say, yes. The person legally entitled to vote is not to be disfranchised by reason of anything mentioned by our correspondent. The right person must have his vote polled. The name of the wrong person must be struck off in the event of a contest.—EDS. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. ESSELL v. HAYWARD. *June* 12.

Partnership—Solicitors—Notice of Dissolution—Breach of Trust and Embezzlement—Decree for Dissolution from date of Notice—Costs.

Where one of two persons, carrying on business as solicitors in partnership for their lives, discovers that his partner as the surviving trustee of a sum of stock, has sold it out and applied the money to his own use, he is justified in giving such partner notice of dissolution of partnership upon the ground of the embezzlement and breach of trust.

The dissolution will take effect from the time of giving notice, and not from the date of a decree made in a suit instituted to dissolve and take the accounts of the partnership.

The defendant having contested the right of the plaintiff to a dissolution was decreed to pay the costs of the suit up to the hearing.

V. C. S. HARPER v. HAYS. *May* 22, 23, 24.

Vendor and Purchaser—Trustee for sale—Duty of such Trustee to get the best price—Agreement for sale set aside.

Real estate was conveyed to H. upon trust, as soon as conveniently might be after the death of A. to sell for the best price, by public auction, or private contract, and to divide the proceeds among certain persons. On the death of A., H. and the *cestius que trusts* agreed that owing to a flaw in the title which could be cured by time, it was inexpedient to sell them, and thereupon, W. H. (one of the *cestius que trusts*) was let into possession of the rents and profits on behalf of all parties interested in the sale monies. Subsequently H., without inviting competition, entered into a negotiation for a sale of the estate to P. for £6000. W. and M. offered a larger sum, and on their offer being refused, bought in the share of one of the *cestius que trusts*, and then gave notice to H. that they objected to a sale for £6000, or to any sale without inviting competition; and at the same time they offered £7000. They also gave P. notice of their objection. H. nevertheless concluded the agreement with P. On bill filed by W. and M. the agreement was set aside, W. and M. undertaking to bid £7000.

M. R. DAVIS v. WHITMORE. *June* 30, *July* 2.

Practice—Foreclosure Suit—Disclaiming Defendant—Costs.

Where in a foreclosure suit, after a defendant has disclaimed all interest in the property, the plaintiff goes on to obtain an absolute decree of foreclosure against him, the latter is entitled to his costs from and after the disclaimer.

V. C. K. IN RE ROOTS. *July* 6.

Will—Construction—Gift of Personalty to Heirs.

A testator gives all his property, subject to the payment of debts to his wife for life, and after bequeathing various legacies, after the death of his wife, whatever property may be left equally between the heirs of his late uncle W. N., late of C. I. N., late of W., and his aunt P. F., late of B. The subject of this gift being personalty.

Held, That the word "heirs" meant heirs at law living at the death of the testator, and not next of kin.

V.C.W. MAYER v. SPENCE. *June* 12, 19.

Practice—Action at Law—Affidavit

In a suit to restrain the infringement of patent rights, the plaintiff is entitled without moving for an injunction, to apply for leave to try his right at law, such application being supported by an affidavit showing a *primâ facie* title in the plaintiff to the patent, and alleging infringement by the defendant.

V. C. W. RE SKINNER'S TRUST. *July* 7.

Will—Specific Bequest—Failure of Purpose.

Testator, by a codicil, revoked a bequest in his will of £1000 to be applied in printing a M.S. work, with certain directions, and left the M S. in trust for his grandson F., that the trustees might provide for the publication of the M.S. to the best advantage for the interests of F., so as to contribute towards raising a fund to assist him at the University. "Should F. die before the book is printed, and it becomes profitable, towards the printing of which I bequeath £1000, and C. has a boy, I wish him to inherit all the benefit that may be derived from this bequest."

The book had never been published as it was not thought likely to succeed.

Held, that the primary object of the codicil being benefit to F., he was entitled to the £1000, although the particular purpose to which it was to be applied had failed.

COMMON LAW.

Q. B. BAYLES v. LUNDY. *April* 15

Sale of goods—Statute of Frauds—Acceptance—Evidence.

Defendant being the holder of a delivery order for goods, sent his servant to the warehouseman to lodge the order and fetch a portion of the goods, which were removed to the defendant's premises.

Held, an acceptance of the goods by the defendant within the 17th section of the Statute of Frauds.

Ex. IN RE. FERNANDEZ. *April* 19

Commitment for contempt of Court—General warrant—Habeas Corpus.

The Courts of Assize are Superior Courts, and as such have authority to commit by general warrant.

The Court of Exchequer, therefore, will not issue a writ of *habeas corpus* to bring up the body of a prisoner committed for contempt by a judge at the Assizes, under a warrant which does not set forth the particulars of the offence.

C. C. R. REG. v. TITE. *April* 27.

Embezzlement—Commercial Traveller—Clerk or servant—Payment by commission, with liberty to take orders for others.

A person engaged by a manufacturer as a commercial traveller, to be paid by commission, with liberty to take orders for others, is a servant.

C C. R. REG. v. JAMES BRAMLEY. *April* 27.

Larceny—Obtaining possession of goods by a trick—False pretence.

It was the course of business at a Colliery where coal was sold by retail, to take the carts when loaded to a weighing machine in the Colliery yard, where they were weighed and the price of the coal paid. The prisoner having gone to the Colliery with a fraudulent intent, a servant of the prosecutor, upon the prisoner saying he wanted a load of best soft coal, loaded prisoner's cart with soft coal and went away, leaving him to take it to be weighed and pay for it. The prisoner then fraudulently covered over the soft coal with slack, an inferior coal, and by this trick and by saying that the coal in the cart was slack, induced the weighing clerk, who did not know that the cart contained the soft coal, to weigh it as slack and charge the prisoner accordingly.

Held, that the prisoner had obtained possession of the soft coal by a trick, and that he was properly convicted of larceny.

Ex. C. CLARKE v. WRIGHT. *Feb.* 8.

Consideration—Marriage settlement—Limitation in favor of illegitimate child—27 Eliz., ch. 4.

The gift of an estate to an illigitimate child under the provisions of a marriage settlement, is not fraudulent and void against a purchaser under 27 Eliz., chap. 4.

C. P. *April* 27.

THE T. J. W. AND SHIP BUILDING CO. v. ROYAL MAIL CO.

Payment into Court—Order for particulars of appropriation of sums paid into Court.

In an action against ship owners for building and extra expenses in building two ships for them, the defendants paid a sum of money into Court in satisfaction of plaintiffs claim. *Held*, that plaintiffs were not entitled to an account of the particular items of their demand to which the said sum was paid into Court.

Q B. REG. v. THE GUARDIANS OF THE CAMBRIDGE UNION.

Quarter Sessions—Appeal—Part heard—Power to adjourn to a subsequent Sessions.

A Court of Quarter Sessions has power to adjourn the hearing of a part heard appeal to a subsequent Sessions

Q. B. CARR v. COOPER. *May* 7.

Error in fact—Amendment of record.

When an infant had appeared as defendant in an action by attorney instead of by guardian, and a verdict was found against him, and error was brought, upon motion to set aside the writ of error and amend the record.

Held, that the Court could not amend the record by substituting an appearance by guardian for an appearance by attorney; the Court cannot, in the exercise of its power of amendment, render the record false.

Q. B. POW v DAVIS. *May* 7.

Breach of warranty of authority to contract as agent—Measure of damages.

When a person has contracted with a supposed agent, who in fact had not authority to contract, he cannot claim indemnity from such supposed agent for damages which did not flow directly from such breach of warranty.

Ex. HAMER ET AL v. KNOWLES AND ANOTHER.

Mines, working of—Rights to support of land over mines—Damages to reversion.

In 1828, one F. conveyed certain lands in fee to one J. S., excepting mines and veins of coal under said lands. At the time of the conveyance there were no buildings on the land. In 1833 a loom shed, engine house, steam engine, mill, &c, were erected. This engine, &c., was worked until 1841. In that year and until 1849, the buildings were enlarged. In 1842 the hereditaments so conveyed to J S., were conveyed to McC. in fee. McC, by will, devised the legal estate to the plaintiffs S. and M. In 1851 the plaintiffs S. and M. conveyed the same to the plaintiff H. The defendants are lessees under F., and took coals from the mines in 1849 and 1850, which caused the land on which the mill, &c., stood to subside. The foundations of the mill buildings were damaged, and the buildings drawn towards the coal workings. The mining operations which caused the damage, were carried on under land near but not immediately adjoining the plaintiff's property. The building and machinery placed on the land did not contribute to cause the subsidence of the ground.

The Plaintiffs S. and M, and the plaintiff H, brought actions against the defendants in 1855

Held, that as the buildings did not contribute to the subsidence, the plaintiffs were entitled to damages for injury to them by the defendants' wrongful act in causing the ground on which they stood to subside.

REVIEWS.

A DIGEST of all CASES decided in the several COURTS of ERROR and APPEAL, QUEEN'S BENCH, COMMON PLEAS, & CHANCERY, in Upper Canada; with a selection of the CHAMBER CASES reported in Vols. 3 to 6, inclusive, of the *Upper Canada Law Journal*. By ROBERT A. HARRISON, Esq., B.C.L., Barrister-at-Law, and HENRY O'BRIEN, Esq., Barrister-at-Law. Toronto; Henry Rowsell, King Street.

This work, of which several of the numbers have already been issued from the press, has been anxiously looked for by the Profession for a long time past. It is now more than nine years since the publication of Robinson and Harrison's Digest (of which this now being issued is a continuation), and its great utility and labor saving benefits have contributed to make this present work, if possible, more of a necessity to the Profession. To the junior members especially it will be a great boon, as they cannot be expected to be as familiar with the cases as their seniors, during whose time they were perhaps reported, but with whom this Digest will be as a book of reference, and a substitute, as it were, for experience.

The first Digest written under the supervision of J. Lukin Robinson, then Reporter of the Court of Queen's Bench, was credited to the labor and energy of Mr. Harrison, at the time only a student, and whose name then appearing for the first time in connection with a law publication, has since become so familiar to the Profession as a writer; and although the necessity for a continuation of the Digest has been felt for some time, no disposition has been evinced, that the writer of this notice is aware of, to take the mantle from Mr. Harrison, but on the contrary the writer, and to his knowledge many others of the Profession, have from time to time urged the matter upon him as the person who was looked to by the Profession to undertake the work. That it is no light one, any person at all familiar with the nature and requirements of such a publication, need not be told. No one having the business of his profession to attend to, could alone within any reasonable time, however diligent he might be, hope to produce the work, and accordingly we find that Mr. Harrison has associated another with him in his labors Mr. O'Brien, whom he doubtless selected as well fitted for the task—one like himself enamoured, as it were, not only of fame, but of hard work.

The Digest will be completed in about 12 numbers at $1 each. Three Dollars of the subscription to be paid in advance.

We need hardly recommend it to the Profession, as there is no one unaware of its being almost a necessity to every practising lawyer, but it might be well to suggest to those who are tardy in securing a copy, that by and by it may be difficult, if not impossible, to get one, the number of copies issued of such a work being generally limited, and a second issue not to be expected for many years.—SENIOR ED. L. J.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet Street. The quarterly number for November is received.

Contents: 1. Jurisprudence at Dublin; 2. Religious trusts; 3. The Rules of Evidence; 4. The Constitutional History of England; 5. Extract of a Letter from Lord Brougham to the Earl of Radnor; 6. Belligerent rights at sea; 7. Journal of a Gloucestershire justice; 8. The Law of Nations; 9. Ram's Treatise on Facts; 10. Martial Law in Australia.

The *first* is an article suggested by the recent Congress of the Association for the promotion of Social Science in Dublin, and is of little interest to us in Canada. The *second* is an exposure of abuses existing among clergy of certain religious denominations. The *third* is a review of a work on Rules of evidence, recently published by Mr. John Appleton, one of the Justices of the Supreme Court of Maine. The *fourth* is an extended review of a Constitutional History of England since the accession of George III., by Thomas Erskine May, C.B. The *fifth* is a letter from Lord Brougham to the Earl of Radnor, in which the veteran law reformer takes a review of the English legislation during the last session of Parliament. The *sixth* is a letter on Belligerent Rights at sea, from Hon. W. B. Lawrence, of Rhode Island, recently ambassador to Great Britain from the United States, to Mr. John Westlake, the Secretary of the International Law department of the Social Science Association. Now that the question of belligerent rights at sea is of universal interest, the letter will be earnestly read and much valued. The *seventh*—Journal of a Gloucestershire justice—is a continuation of the diary of Rev. Francis Welles, Vicar of Prestbury, from 1715 to 1756. The *eighth* is a review upon a work entitled "The Law of Nations considered as Independent Political Communities," by Travers Twiss, D.C.L., Regius Professor of Civil Law in the University of Oxford. The *ninth* is a review of a treatise on Facts and Subjects of Enquiry by a Jury, recently published by James Ram, Esq., of the Inner Temple, Barrister-at-Law. The book reviewed is described as a novel and instructive one, "making romance and poetry the staple materials of a legal treatise." The *tenth* is a learned article in which the writer argues with great force that the exercise of martial law by the governor of a British colony is illegal, whether included in his commission or not.

GODEY'S LADY BOOK, for January, 1862, is received. Contains two original designs of great merit: the one, "Our Father who art in Heaven;" and the other, "A Slow Coach." The fashion-plate contains no less than seven well-colored figures. Nothing can excel the beauty of the fashion-plates in Godey. It is said that this magazine contains in one year 400 more pages of reading than any other magazine; twice as many engravings; and at least 50 more colored fashions. The terms are:—One copy, one year, $3; two copies, one year, $5; three copies, one year, $6; five copies, one year, and to the person sending the club, $11 25. At these prices, subscribers in the British Provinces have no United States' postage to pay.

APPOINTMENTS TO OFFICE, &C.

POLICE MAGISTRATES.

GEORGE BOOMER, of the City of Toronto, Esquire, to be Police Magistrate for the City of Toronto, in the room of George Gurnett, Esquire, deceased.—(Gazetted November 30, 1861.)

CLERKS OF THE PEACE.

RICHARD DEMPSEY, of the City of Toronto, Esquire, to be Clerk of the Peace, in the room and stead of George Gurnett, Esquire, deceased.—(Gazetted November 23, 1861.)

CLERKS OF COUNTY COURTS.

THOMAS D. WARREN, of St. Thomas, Esquire, to be Clerk of the County Court of the County of Elgin.—(Gazetted November 23, 1861.)

NOTARIES PUBLIC

JOHN A. MACKENZIE, of Sarnia, Barrister-at-law, to be a Notary Public for Upper Canada.—(Gazetted November 16, 1861.)

GEORGE B. BOYLE, of Saint Catharines, Esquire, Attorney-at-law, to be a Notary Public in Upper Canada.—(Gazetted November 23, 1861.)

WILLIAM DOUGLASS, of Chatham, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted November 23, 1861.)

CORONERS.

CHARLES HILL, Esquire, to be an associate Coroner for the United Counties of Huron and Bruce.—(Gazetted November 23, 1861.)

PETER MCLAREN, Esquire, M.D., to be an associate Coroner for the County of Bruce.—(Gazetted November 30, 1861.)

EDWARD A. PAGET, Esquire, M.D., to be an associate Coroner for the County of Perth.—(Gazetted, November 30, 1861.)

TO CORRESPONDENTS.

"D.," "A DIVISION COURT CLERK,"—Under "Division Courts."

"A TOWN CLERK,"—Under "General Correspondence."